Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1699

HAWAIIAN TELEPHONE COMPANY,

and

HAWAII EMPLOYERS COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES, AND CHAMBER OF COMMERCE OF HAWAII,

Petitioners,

vs.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, ROBERT K. HASEGAWA, THOMAS S. BROWN,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1357, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1260, AND HAWAII STATE FEDERATION OF LABOR, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 4

Reasons for Granting the Writ 6

A. The Decision Below Conflicts with the Decisions of Other Courts of Appeals 6

B. The Decision Below Misinterpreted *Hicks* v. *Miranda* and Other Decisions of This Court 7

Conclusion 10

Appendices

Appendix A, Decision of the Court of Appeals for the Ninth Circuit in Case No. 76-1584 and Case No. 76-2056 ..... A1

Appendix B, Order dated March 24, 1980 in Case No. 76-1584 and Case No. 76-2056 granting Appellees' Motion for a Stay of Mandate, United States Court of Appeals for the Ninth Circuit A8

Appendix C, Opinion of the United States District Court for the District of Hawaii dated July 12, 1974 granting plaintiff's prayer for a Preliminary Injunction A9

Appendix D, Declaratory Judgment and Order, dated October 14, 1975, of the United States District Court for the District of Hawaii in favor of Hawaiian Telephone Company and Hawaii Employers Council et al. A24

Table of Authorities

Cases

Batterton v. Francis, 432 U. S. 416 (1977) 6
Colorado Springs Amusement Ltd. v. Rizzo, 524 F. 2d 571 (3rd Cir. 1975) *cert. denied* 428 U. S. 913 (1976) 7
Fusari v. Steinberg, 419 U. S. 379 (1975) 7
Gibson v. Berryhill, 411 U. S. 564 (1973) 7
Hicks v. Miranda, 422 U. S. 332 (1975) 2, 6, 7, 9, 10
Kimbell, Inc. v. Employment Security Commission of New Mexico, 429 U. S. 804 (1976) 2, 6, 7, 8, 9, 10
Mandel v. Bradley, 432 U. S. 173 (1977) 7
Meadow Gold Dairies v. Wiig, 50 Haw. 225, 437 P. 2d 317 (1968) 4
N. L. R. B. v. MacKay Radio and Telegraph Co., 304 U. S. 333 (1938) 5
New York Telephone Co. v. New York Department of Labor, 566 F. 2d (2nd Cir. 1977) *aff'd* 440 U. S. 519 (1979) 6
New York Telephone Co. v. New York Department of Labor, 440 U. S. 519 (1979) 9, 10
Ohio Bureau of Employment Service v. Hodory, 431 U. S. 471 (1977) 6, 9
Super Tire Engineering Corp. v. McCorkle, 550 F. 2d 903 (3rd Cir.) *cert. denied* 434 U. S. 827 (1977) 6

Constitutional Provisions and Statutes

Article VI, Clause 2, United States Constitution 2
Labor-Management Relations Act of 1947, 29 U. S. C. § 141 3
Hawaii Employment Security Law, Haw. Rev. Stat. § 383-30 ..... 3, 4

Other Sources

Appellees Answer Brief, *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, New Mexico Supreme Court, Case No. 10323 8
Brief for the Chamber of Commerce of the United States of America As *Amicus Curiae, Kimbell, Inc.* v. *Employment Security Commission*, United States Supreme Court No. 75-1452 8
Comment, *The Precedential Weight of a Dismissal by The Supreme Court For Want of a Substantial Federal Question: Some Implications of Hicks* v. *Miranda*, 76 Colom. L. Rev. 508 (1976) 7
Memorandum For The United States As *Amicus Curiae, Kimbell, Inc.* v. *Employment Security Commission*, United States Supreme Court No. 75-1452 8
Motion of Appellee To Dismiss Appeal, *Kimbell, Inc.* v. *Employment Security Commission*, United States Supreme Court No. 75-1452 8
65 ABA Journal 1328 (1979) 7
Supplemental Brief in Response To Memorandum For The United States As *Amicus Curiae, Kimbell, Inc.* v. *Employment Security Commission*, United States Supreme Court No. 75-1452 8

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STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, ROBERT K. HASEGAWA, THOMAS S. BROWN,

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1357, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1260, AND HAWAII STATE FEDERATION OF LABOR, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joint Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 10, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A hereto. The Court's subsequent order of March 10, 1980, granting a stay of mandate, is reproduced as Appendix B. The initial opinion of the District Court granting a preliminary injunction was entered on July 12, 1974, and is reported at 378 F. Supp. 791. Appendix C. The District Court's final opinion, entered on October 14, 1975, and a final declaratory judgment and order, as amended, entered on February 9, 1976, are reported at 405 F. Supp. 275. Appendix D.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit issued on March 10, 1980. App. A. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

Whether, under the doctrine of *Hicks* v. *Miranda*, 422 U. S. 332 (1975), this Court's summary dismissal of the appeal in *Kimbell, Inc.* v. *Employment Security Commission*, 429 U. S. 804 (1976), requires that the lower courts sustain, notwithstanding federal preemption considerations, any special accommodations in aid of labor unions under "American Rule" state unemployment compensation schemes, despite the impact of those special accommodations upon the core of federal labor policy, i.e. free collective bargaining, and despite the absence of any Congressional approval of such special accommodations.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

In pertinent part, the Hawaii Employment Security Law (Haw. Rev. Stat. Ch. 383) provides:

> § 383-30 *Disqualification for Benefits.* An individual shall be disqualified for benefits . . .
>
> (4) Labor dispute. For any week with respect to which it is found that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed; provided that this paragraph shall not apply if it is shown that:
>
> (A) He is not participating in or directly interested in the labor dispute which caused the stoppage of work; and
>
> (B) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or directly interested in the dispute; provided that, if in any case separate branches of work, which are commonly conducted as separate businesses in separate premises, each such department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment or other premises.

Section 1 of the Labor Management Relations Act, 1947 (29 U. S. C. § 141), provides:

> Short title; Congressional declaration of purpose and policy
>
> * * * * *
>
> (b) Industrial strike which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or sub-

stantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employer in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

STATEMENT OF THE CASE

Within one week after commencing an economic strike against Hawaiian Telephone Company ("HAWTEL") in May, 1974, over 3,000 strikers, none of whom was permanently replaced, filed claims for unemployment compensation benefits, which would have substantially replaced their lost wages. Thereafter, while the strike was still in progress, the Hawaii Department of Labor and Industrial Relations ("HDLIR") waived the normal requirement that these claimants seek or register for work, accepted their claims on "mass claim sheets" signed at picket lines or at their union's office, and commenced an administrative investigation into the HAWTEL's strikebound operations.[1] App. C, p. A13; App. D, p. A51. Shortly after

1. Hawaii law (see p. 3, *supra*) permits strikers to receive unemployment benefits only where there has not been a "stoppage of work", i.e., a "substantial curtailment" of the employer's productive operations. App. A, p. A2; *Meadow Gold Dairies* v. *Wiig*, 50 Haw. 225, 437 P. 2d 317 (1968).

the 35-day strike ended, with all strikers returning to their jobs, HAWTEL brought this action, in the United States District Court for the District of Hawaii, seeking to prevent the HDLIR from obtaining and providing to the striking union information about its strike-bound operations, as well as to prevent the payment of over $1.2 million in benefits at the Company's expense. The complaint alleged that, under the Supremacy Clause of the United States Constitution, Hawaii's striker benefit scheme was preempted because it impinged upon HAWTEL's right to successfully exercise its federal right to maintain productive operations during a strike. See, e.g., *N. L. R. B.* v. *MacKay Radio and Telegraph Co.*, 304 U. S. 333, 345 (1938).

Reviewing essentially undisputed facts, the District Court granted HAWTEL a preliminary injunction and entered an opinion on July 12, 1974. App. C.

After pretrial conferences which resulted in numerous factual stipulations, the case was tried before the District Court in October and December, 1974. The District Court received extensive additional evidence concerning the nature and impact upon the process of collective bargaining of Hawaii's policy of providing confidential business data to unions and money to their striking members only when the State determines that an employer has maintained productive operations in spite of a strike. The Court subsequently entered a declaratory order declaring that the challenged Hawaii law was invalid. App. D.[2]

On appeal, the Court of Appeals reversed. It held that this Court's summary disposition "for want of substantial federal

2. The District Court found that the availability of tax-free benefits to strikers at HAWTEL's expense, as well as the company's required disclosure of detailed operating information useful to the union, "irreconcilably intrudes into the federal process of free collective bargaining." App. D, p. A53. The Court further concluded that "Congress has never even inferred that it approves this anomalous situation," and found that Hawaii's law "fundamental[ly] differ[s]" from the New York and Rhode Island type of unemployment acts "in the scope of [its] application." App. D, pp. A53, A45. None of these findings were disturbed on appeal.

question" in *Kimbell, Inc.* v. *Employment Security Commission,* 429 U. S. 804 (1976), was "controlling" under the doctrine of *Hicks* v. *Miranda,* 422 U. S. 332 (1975). The lower court agreed with the reasoning of the Third Circuit in *Super Tire Engineering Corp.* v. *McCorkle,* 550 F. 2d 903 (3rd Cir.), *cert. den.* 434 U. S. 827 (1977), which had similarly found *Kimbell* to be "a binding precedent," and distinguished *New York Telephone Co.* v. *New York Dept. of Labor,* 566 F. 2d 388 (2d Cir. 1977), *aff'd* 440 U.S. 519 (1979), which had "determined that *Kimbell* was not a binding precedent in the case before it." The Court of Appeals, therefore, did not address the "merits" of the Hawaii law. App. A, p. A3.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts with the Decisions of Other Courts of Appeals

The decision below raises a substantial question with respect to the effect of a summary dismissal under the *Hicks* doctrine. In the area at issue—whether state unemployment compensation statutes improperly impinge upon federal labor law —the courts of appeals have drawn conflicting conclusions. The Court below, as well as the Third Circuit, concluded that under *Hicks,* this Court's summary disposition of *Kimbell* "already determined the issue before us . . . . [That decision constituted] a rejection of the substantive contention that federal labor policy precludes such [unemployment] compensation." App. A, p. A5, quoting *Super Tire,* 550 F. 2d at 908. By contrast, the Second Circuit in *New York Telephone* rejected the argument that *Kimbell* was controlling. 566 F. 2d at 391, n. 2. In that Court's view, *Ohio Bureau of Employment Service* v. *Hodory,* 431 U. S. 471, 475, n. 3 (1977) and *Batterton* v. *Francis,* 432 U. S. 416, 424, n. 7 (1977) provided intervening guidance which stripped *Kimbell* of effect as precedent.

The instant case provides a desirable vehicle to resolve a significant conflict between the lower courts as to the "somewhat opaque" (*Gibson* v. *Berryhill,* 411 U. S. 564, 576 (1973)) effect of a summary disposition under *Kimbell.*

B. The Decision Below Misinterpreted Hicks v. Miranda and Other Decisions of This Court

1. This Court in a letter to Senator DeConcini dated June 22, 1978, reiterated ". . . we know from experience, our summary dispositions often are uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity."[3] The precedential value of such decisions, accordingly, is strictly limited to the particular facts and issues most narrowly resolved. Under no circumstances "should [a summary dismissal] be understood as breaking new ground." *Mandel* v. *Bradley,* 432 U. S. 173, 176 (1977). More specifically, *Hicks* mandates that each court "ascertain what issues had been properly presented . . . and declared by this Court to be without substance." *Hicks,* 422 U. S. at 345, n. 14. Only after determining the exact "reach and content" of the Supreme Court's summary action, which is itself an issue of "real substance", is a court free to consider itself bound by a summary dismissal. *Hicks,* 422 U. S. at 345 n. 14. Indeed, this Court has expressly disapproved the actions of courts that failed, as in the instant case, to undertake such a "precise analysis". *Fusari* v. *Steinberg,* 419 U. S. 379, 388 n. 15 (1975).[4]

The factual presentation made by the Petitioners before the District Court renders the instant case wholly inapposite to *Kimbell.* That case arose from a state administrative hearing in

3. 65 ABA Journal 1328 (1979).

4. See also Comment, *The Precedential Weight of a Dismissal by The Supreme Court For Want of a Substantial Federal Question: Some Implications of Hicks* v. *Miranda,* 76 Colum. L. Rev. 508 (1976); *Colorado Springs Amusement Ltd.* v. *Rizzo,* 524 F. 2d 571, 576, n. 13 (3rd Cir. 1975), *cert. den.* 428 U. S. 913 (1976).

which the employer, unlike HAWTEL, made no effort to adduce any evidence as to the actual impact of New Mexico's unemployment compensation system upon employers operating under the federal labor laws. Instead, the employer in *Kimbell* relied entirely upon the assumption that the disputed payments had "pervasive effect".[5] The factual record in *Kimbell,* in marked contrast to the evidence that HAWTEL presented, was devoid of any evidence of impact on employers, prompting the Attorney General of New Mexico to assert in his Motion to Dismiss that "THIS CASE DOES NOT PRESENT AN APPROPRIATE RECORD UPON WHICH TO REVIEW THE FEDERAL QUESTION PRESENTED" since:

> [T]here is not a scintilla of evidence in the record of this case to support consideration of questions posed by the First Circuit Court of Appeals in its *Grinnell* [*Corp.* v. *Hackett,* 475 F. 2d 449 (1st Cir.), *cert. denied,* 414 U. S. 858 (1973)] and *ITT* [*Lamp Division* v. *Minter,* 435 F. 2d 989 (1st Cir. 1970), *cert. denied,* 402 U. S. 933 (1971)] opinions. No such evidentiary record was attempted by the Appellants in the State courts, nor could such a record have been established in this case since the labor dispute had been settled before the Employment Security Commission decided that the striking claimants were entitled to any unemployment benefits. Motion of Appellee to Dismiss Appeal, filed in *Kimbell, Inc.* v. *Employment Security Commission of the State of New Mexico,* U. S. Sup. Ct. No. 75-1452, p. 8.

See also in this connection Memorandum for the United States as *Amicus Curiae,* filed in *Kimbell, Inc.* v. *Employment Security Commission,* Sup. Ct. No. 75-1452, pp. 8-10; Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae,* filed in *Kimbell, Inc.* v. *Employment Security Commission,* Sup. Ct. No. 75-1452, pp. 18-25; Supplemental Brief in Response to Memorandum for the United States as

5. See, Appellees Answer Brief, p. 26, *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* New Mexico Supreme Court, Case No: 10323.

Amicus Curiae, filed in *Kimbell, Inc.* v. *Employment Security Commission,* Sup. Ct. No. 75-1452, pp. 8-11. In short, the employer in *Kimbell* was requesting judgment in its favor on the pleadings asserting that the requisite evidentiary record had not been made. There is no such defect, however, in the present record. On this basis alone, the court below erred in its conclusion that *Kimbell* is dispositive of the instant case.

2. *Hicks* also recognized that even where this Court has considered a federal question to be insubstantial, the question so remains "except when doctrinal developments indicate otherwise." *Id.* at 344. The Ninth Circuit, however, has nevertheless disregarded the doctrinal developments articulated by this Court in *Ohio Bureau of Employment Service* v. *Hodory, supra,* and *New York Telephone* v. *New York Department of Labor,* 440 U. S. 519 (1979). Indeed, if *Kimbell* was as broad a precedent as found by the court below, there would have been little reason for this Court to have granted certiorari in *New York Telephone.*

New York Telephone provides a significant doctrinal development: it requires a court to focus not on "whether Congress, explicitly or implicitly has ruled out such assistance . . ." in a general sense, but, rather, on whether there is Congressional intent to tolerate the "more direct regulation of labor-management relations at issue in [this] case." 440 U. S. at 550 (Opinion of Justices Blackmun and Marshall, concurring). There are manifold differences between the New York unemployment compensation scheme and the Hawaii system at issue here: for example, (a) unlike New York, Hawaii extracts confidential employer information during a strike, (b) unlike New York, Hawaii waives for strikers the requirements of registration for, availability for, and search for suitable work, (c) unlike New York, actual or implied job loss is irrelevant in Hawaii, and (d) unlike New York, in Hawaii the employer fully replenishes its reserve account for benefits paid to strikers. The "fortuity" that New York's type of law, which confers a benefit on a broadly defined class of unemployed persons, has been deemed condoned

by Congress "should not obscure a difference in reasoning that could prove important in some other preemption case." *New York Telephone,* 440 U. S. at 549 (Opinion of Justices Blackmun and Marshall, concurring in the judgment). This case is that "other preemption case." It is a case, therefore, which should have been addressed on its merits in light of *New York Telephone,* rather than summarily disposed of under *Kimbell*—a case rendered an historical anecdote by *New York Telephone.*

This Court should clarify the applicable legal standard under which special accommodations intended to assist a striking union by a state under the guise of an unemployment statute, unlike New York's, will be evaluated. If *Kimbell* is to be this Court's only guidance on an issue so vital to the survival of the collective bargaining process in accord with the Ninth Circuit's *Hicks* analysis, then the "blank check" feared by Mr. Justice Powell's dissent in *New York Telephone* (440 U. S. at 565-566), has now been provided.

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Ninth Circuit
Filed March 10, 1980

Hawaiian Telephone Co., etc.
Appellee,
and
Hawaii Employers Council et al.,
Intervenors,
vs.
State of Hawaii Dept. of Labor & Industrial Relations, et al.,
Defendants,
International Brotherhood of Electrical Workers, AFL-CIO, Local 1357, etc., et al.,
Intervenors and Appellants.

No. 76-1584

Hawaiian Telephone Co., etc.
Appellee,
and
Hawaii Employers Council et al.,
Intervenors,
vs.
State of Hawaii Dept. of Labor & Industrial Relations, et al.,
Appellants,
and
International Brotherhood of Electrical Workers, AFL-CIO, Local 1357, etc., et al.,
Intervenors.

No. 76-2056

OPINION

Appeal from the United States District Court
for the District of Hawaii

Martin Pence, District Judge, Presiding

Argued and submitted November 14, 1979

Before: WRIGHT and GOODWIN, *Circuit Judges*, and MURRAY*, *District Judge*.

PER CURIAM:

The Hawaii Department of Labor appeals a judgment which struck down, on federal preemption grounds, a state statute[1] compelling employers under certain conditions to finance strikes against themselves. The Hawaii law permits strikers to collect unemployment compensation if their strike does not substantially curtail[2] the productive operations of their employer.

In 1974, a number of Hawaiian Telephone Company employees went on strike. When the strike ended the Hawaii Department of Labor began an inquiry to determine whether the strike had "substantially curtailed" the Company's productive operations. If the strike had not done so, the Department would have had to order retroactive employment benefits paid to

* The Honorable William D. Murray, Senior United States District Judge for the District of Montana.

1. Haw. Rev. Stat. § 383-30 (1978 Code) Disqualification for Benefits. "An individual shall be disqualified for benefits:

* * * * *

"(4) Labor Dispute. For any week with respect to which it is found that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed; . . ."

2. The Hawaii Supreme Court has interpreted the phrase "stoppage of work" to mean a "substantial curtailment" of the employer's productive operations. *Meadow Gold Dairies* v. *Wiig*, 50 Haw. 225, 437 P. 2d 317 (1968).

the Company's striking employees. The Company under the statute would then have had to replenish the state employment compensation fund in an amount equal to the distributions to the strikers. Prior to completion of the departmental inquiry, however, the Company sought an injunction in the district court to bar the Hawaii Department of Labor from continuing with its investigation. The Company alleged that Congress, in enacting the National Labor Relations Act, had preempted state laws permitting strikers to collect unemployment benefits. The district court agreed, and declared Hawaii's law void.

The wisdom or even the fairness of Hawaii's economic legislation is not before us. We do not pass upon its merits. The only issue before us is federal preemption: specifically, whether our determination of the question of federal preemption in this case is controlled by the Supreme Court's summary dismissal of the appeal in *Kimbell* v. *Employment Security Commission*, 429 U. S. 804 (1976).

Denial of certiorari imports nothing about the merits of a case. "Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question is a disposition on the merits." C. A. Wright, Handbook of the Law of Federal Courts 551 (3d edition 1976). Although a summary affirmance is "an affirmance of the judgment only . . . [and] not necessarily [of] the reasoning by which it was reached[,] . . . [s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction . . ." *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977). Consequently, they "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided." *Id. See also Hicks* v. *Miranda*, 422 U. S. 332, 344-345 (1975); *In re Northwest Homes of Chehalis, Inc.*, 526 F. 2d 505, 506 (9th Cir. 1975), *cert. denied sub nom. Hansen* v. *Weyerhaeuser Co.*, 425 U. S. 907 (1976).

The Hawaii statute alleged to be preempted (and the interpretation given that statute) is identical to the New Mexico statute against which the same claim was raised in *Kimbell* v. *Employment Security Commission, supra.*[3] Both statutes were challenged in their respective states by employers on grounds of federal preemption. The courts of first instance in Hawaii and New Mexico found that the National Labor Relations Act indeed had preempted these state laws providing for compensation to strikers at company expense. *Hawaiian Telephone Co.* v. *Hawaii Department of Labor,* 405 F. Supp. 275 (D. Haw. 1976); *Kimbell, Inc.* v. *Employment Security Commission,* (Dist. Ct. of N. M., Bernalillo County). The Hawaii appellants appealed to this court. The New Mexico appeal went to the New Mexico Supreme Court, which reversed by a summary order. *Kimbell, Inc.* v. *Employment Security Commission,* No. 10323 (unreported order of the New Mexico Supreme Court, Dec. 29, 1975).[4] On appeal to the United States Supreme Court, the jurisdictional statement put the question:

> ". . . Does the grant of unemployment compensation benefits to strikers by the state of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by disrupting the operation of federal labor policy requiring state neutrality in the collective bargaining process?"

3. The New Mexico statute provided that an applicant for unemployment compensation would be disqualified from receiving benefits "for any week with respect to which . . . his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed . . ." 1975 N. M. Laws Ch. 351, § 1 (codified at N. M. Stat. Ann. § 59-9-5(d) (Supp. 1975); current version at N. M. Stat. Ann. § 51-1-7(D) (1979). The New Mexico Supreme Court had interpreted the phrase "stoppage of work" to mean a "substantial curtailment" of the employer's productive operations. *Albuquerque-Phoenix Express* v. *Employment Security Commission,* 88 N. M. 596, 544 P. 2d 1161 (1975).

(Note: a 1979 amendment eliminated the work stoppage language from this code provision.)

4. The substance of the challenge is unaffected by the fact that in Hawaii a federal court adjudicated the federal preemption issue, while in New Mexico a state court adjudicated the issue.

See 44 U. S. L. W. 3612. The Supreme Court dismissed the appeal for want of a substantial federal question. *Kimbell* v. *Employment Security Commission,* 429 U. S. 804 (1976).

Following this sequence of events, the Third Circuit in *Super Tire Engineering Co.* v. *McCorkle,* 550 F. 2d 903, 905-908 (3d Cir.) *cert. denied* 434 U. S. 827 (1977), concluded that *Kimbell* was a binding precedent controlling the case before it. In *Super Tire* the Third Circuit was confronted with a New Jersey statute allowing welfare benefits for strikers. The employers of the strikers had challenged the statute as inconsistent with and therefore precluded by federal labor policy. The court dismissed their claim with these words:

> ". . . [T]he [United States] Supreme Court has already determined the issue before us and we are bound by its determination. The Court [in *Kimbell*] determined that no substantial federal question was presented by a claim that state unemployment compensation to strikers is contrary to federal labor policy. Logically subsumed in that ultimate determination is a rejection of the substantive contention that federal labor policy precludes such compensation." 550 F. 2d at 908.

The Second Circuit, however, in *New York Telephone* v. *New York Department of Labor,* 566 F. 2d 388 (2d Cir. 1977), *aff'd.* 440 U. S. 519 (1979), determined that *Kimbell* was not a binding precedent in the case before it. 566 F. 2d at 391 n. 2.[5] In *New York Telephone* the Second Circuit was faced with a New York statute allowing unemployment compensation to strikers, and a challenge to that law by the employers of the strikers on grounds of preemption.

The challenged New York law differed from the New Mexico law in that New York paid compensation to strikers even if

5. Note 2, 566 F. 2d at 391, contains a clerical error. The New Mexico Supreme Court's *Kimbell* decision did *not* reverse *Albuquerque-Phoenix Express, Inc.* v. *Employment Security Commission,* 88 N. M. 596, 544 P. 2d 1161 (1975). Rather, the court *relied* on the latter case in reversing the judgment of the lower state court in *Kimbell.*

their strike completely closed their employer's operations. The statute in *Kimbell* had permitted payment of unemployment benefits to strikers only if the strike caused something less than a total closure of the employer's business.

Unlike the New York law before the Second Circuit, the Hawaii statute challenged here is identical to the New Mexico statute. Because it is, we follow *Kimbell*. In doing so we do not determine the maximum scope of *Kimbell's* precedential effect: whether, for instance, we would find *Kimbell* controlling in circumstances like those in *Super Tire*. All we decide is that *Kimbell* must be followed here. If *Kimbell* is not controlling in a situation like this one, where the two state laws are identical, *Kimbell*, for practical purposes, would have no force as precedent.

In *New York Telephone Co.* v. *New York Department of Labor*, 440 U. S. 519 (1979), the Supreme Court held that federal labor law did not preempt the New York statute. Although no opinion of the Court commanded a majority of the justices, six justices agreed on the central point in issue—Congress, in enacting the Social Security Act, intended to tolerate New York's law allowing unemployment compensation to strikers. As a result, there is nothing in the Supreme Court's opinion derogating from the reasoning which underlies *Kimbell*. The vitality of *Kimbell's* precedential force therefore remains unimpaired. The *New York Telephone* plurality opinion in fact took note of the court's *Kimbell* holding in a footnote. 440 U. S. 519, 534 n. 24.[6]

6. The footnote reads:

"... It is true that only Rhode Island has a statutory provision like New York's that allows strikers to receive benefits after a waiting period of several weeks. *See Grinnell Corp.* v. *Hackett*, 475 F. 2d 449, 457-459 (CA1 1973). But most States provide benefits to striking employees who have been replaced by nonstriking employees, and many States, pursuant to the so-called 'American rule,' allow strikers to collect benefits so long as their activities have not substantially curtailed the

(Footnote continued on next page.)

The Supreme Court in *Kimbell* held that New Mexico was free to assert its own policy in the compensation of striking employees. In *New York Telephone*, the same court held that New York was equally free to do so.[7] We must conclude that Hawaii also has the power to carry forward its own policy in this field.

Reversed.

(Footnote continued from preceding page.)

productive operations of their employer. *See Hawaiian Telephone Co.* v. *Hawaii Dept. of Labor and Industrial Relations*, 405 F. Supp. 275, 287-288 (D. Hawaii 1976), *cert. denied*, 435 U. S. 943. For example, in *Kimbell, Inc.* v. *Employment Security Commission*, 428 U. S. 804, this Court dismissed for want of a substantial federal question an appeal from the Supreme Court of New Mexico which had held that a retroactive post-strike award of unemployment benefits to strikers under the 'American rule' was not pre-empted by federal labor law."

7. In addition, it should be noted that New York's statute is arguably less consistent with federal labor policy than is Hawaii's. (The Supreme Court's plurality in *New York Telephone* even seemed to imply this when it recognized that "unlike" states such as New Mexico and Hawaii, New York had "concluded that the community interest in the security of persons directly affected by a strike outweighs the interest in avoiding any impact on a particular labor dispute." 440 U. S. 519, 534.) The New York law permits unemployment compensation to strikers even if their strike completely closes an employer's business. The Hawaii law, on the other hand, allows unemployment benefits to strikers only if their strike causes less than a substantial curtailment of the employer's work.

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Ninth Circuit
Filed March 24, 1980

Hawaii Telephone Company,
a Hawaii corporation,
Plaintiff/Appellee,

Hawaii Employers Council, et al.,
Intervenor/Plaintiff/Appellees,

vs.

State of Hawaii Department of Labor
and Industrial Relations, et al.,
Defendants/Appellants,

and

International Brotherhood of Electrical
Workers, AFL-CIO, Local 1357, et al.,
Intervenor/Defendant/Appellants.

No. 76-1584)
76-2056)

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41(b) Fed. R. App. P.)

Upon due consideration of appellee motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before April 24, 1980,

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted.*

/s/ Alfred Goodwin
United States Circuit Judge

CA9-003 (12/3/79) Judge Goodwin

* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

APPENDIX C

Opinion Granting Preliminary Injunction
[378 F. Supp. 791]

UNITED STATES DISTRICT COURT
D. Hawaii
Civ. No. 74-140
July 12, 1974

HAWAIIAN TELEPHONE COMPANY, Individually and on behalf of all employers engaged in interstate commerce within the State of Hawaii, who are subject to the Hawaii Employment Security Law,

Plaintiff,

v.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS *et al.*,

Defendants,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 1357,

Intervenor-Defendant.

Jared H. Jossem, Raymond M. Torkildson, Torkildson, Katz & Conahan, Honolulu, Hawaii, for plaintiff.

George Pai, Atty, Gen., Roy M. Miyamoto, Deputy Atty. Gen., State of Hawaii, for defendants.

James A. King, Edward H. Nakamura, Bouslog & Symonds, Honolulu, Hawaii, for intervenor-defendant.

DECISION

PENCE, *Chief Judge.*

Plaintiff, Hawaiian Telephone Company (TELCO), a public utility, with a state-granted monopoly over telephone communications, seeks injunctive relief against the defendants who operate and direct the State of Hawaii Department of Labor and Industrial Relations (DLIR).

Defendant DLIR, and its director, Hasegawa, with its senior examiner of the Unemployment Insurance Division, Brown, administer HRS Chapter 383, Hawaii's unemployment compensation laws.

By stipulation, IBEW Local 1357 (Union), the union which represents the employees of TELCO, has intervened. Although other sections therefor were alleged, the basis for this court's jurisdiction is under 28 U. S. C. §§ 1331 and 1337.

TELCO is certainly "in commerce" under § 1337 and the question raised is equally certain a federal one under § 1331. The aggregate amount which TELCO would have to pay in to the state's unemployment fund if the state's position is sustained would be over $832,000. If more were needed, as indicated in Almacs, Inc. v. Hackett, 312 F. Supp. 964, 967 (D. R. I. [792] 1970): "in equity suits the value to be measured for jurisdictional purposes is the value of the right sought to be protected, here the right to bargain collectively free from state interference, a right which cannot as of this time clearly be valued at less than $10,000."

TELCO allegations satisfy the jurisdictional requirements of both §§ 1331 and 1337. Since TELCO's action is primarily based upon a claim of federal legislative supremacy, a single judge may hear this case.

Applicable State Law

HRS Chapter 383-30, Disqualification for Benefits, provides that an individual shall be disqualified for unemployment benefits under "(4) Labor dispute. For any week with respect to which it is found that his unemployment is due to a stoppage of work which exists because of a labor dispute at the . . . establishment . . . at which he is or was last employed."

In Interisland Resorts v. Akahane, 46 Haw. 140, 377 P. 2d 715 (1962), the Supreme Court of Hawaii, fundamentally relying upon the fact that Hawaii's Employment Security Law had its origin in the British Unemployment Insurance Acts, of 1911, adopted the British Umpires construction of the term "stoppage of work" as referring " 'not to the cessation of the workman's labour, but to a stoppage of the work carried on in the . . . premises at which the workman is employed.' " 46 Haw. at 147, 377 P. 2d at 720. *Akahane* was an organizational strike. Immediately after being struck the hotel was able to prevent closing down of hotel operations with the help of supervisors and hotel guests, and within a week had hired replacements for the strikers. The strikers in fact were out of their jobs.

In Gaspro v. Labor & Ind. Rel. Comm'n., 46 Haw. 164, 377 P. 2d 932 (1962), in a similar organizational strike, Gaspro was almost completely shut down for about five weeks, *i.e.*, until it hired new employees to permanently replace the strikers. Here, too, the strikers were out of their jobs.

In Meadow Gold Dairies v. Wiig, 50 Haw. 225, 437 P. 2d 317 (1968), the Dairies with the assistance of non-bargaining unit members and *temporary* replacements were able to carry on about 82% of their business. The Unemployment Compensation Appeals Referee, applying *Akahane*, found that there had been no " 'substantial curtailment of the business activities at the employer's establishment. . . .' " (50 Haw. at 227, 437

P. 2d at 319) and paid unemployment compensation to the strikers.

When employees of the Hawaiian Electric Company, a public utility, struck in February of 1974, because Hawaiian Electric continued to generate and sell electricity during the strike, they were deemed not to be disqualified. The Department of Labor paid unemployment benefits in excess of $100,000 to the striking employees.

Unemployment benefits are paid out of a state fund which is maintained in part by payroll taxes levied against the employers. Subject to a limitation that the employer's tax cannot exceed 3% of the annual payroll, the state law permits an employer's favorable experience to give him a lower tax. For example, TELCO's taxes for 1974 were but 1.6% of annual payroll. In the event that unemployment benefits are paid to its striking employees, those benefits will then be charged against the employer's account and increase its tax rate and contribution.

Findings of Fact

TELCO is an employer engaged in interstate commerce subject to the jurisdiction of the NLRB, the Federal Social Security Act, and the Hawaii Revised Statutes, Chapter 383, the Employment Security Law, and related rules, insofar as unemployment benefits thereunder may be provided to employees on strike.

On April 30, 1974, the collective bargaining agreements between TELCO and the Union, for the TELCO employees represented by it, terminated. One week later, on May 7, some 3,300

[793]

employees of TELCO struck TELCO, left their jobs, and established picket lines at the employer's various places of business in Hawaii.

The Union's first strike bulletin, issued on the very day of the strike, stated among other messages:

> "Your shop steward will . . . be able to answer basic questions about unemployment compensation . . . ."

On May 8, the second day of the strike, an article appeared in the Honolulu Star-Bulletin, an evening newspaper, with the largest circulation, entitled "Strikers Can Qualify for Jobless Pay." On that same day, the Department of Labor posted an 18″ x 30″ sign on the glass front of its Unemployment Insurance Division, stating:

> "Hawaiian Telephone Strikers
> Contact your Union to File
> Your Claim"

On Kauai the Union chairman set up a Saturday, May 11, meeting with state officials to assist the Union in filling out "mass applications" for unemployment benefits. Before that Saturday, the Union was provided with mass claim sheets for unemployment compensation by the State Department of Labor. The May 11, 1974 Union strike bulletin said:

> "Our crews are hard at work gathering information and completing forms for unemployment compensation. If you have not applied, contact your picket captain immediately and he or she will make arrangements for you to meet with one of our union members assigned to processing unemployment compensation applications."

During the strike over 3,000 employees who were not working because of the labor dispute signed or had their names placed on the mass claim sheets. Also during the strike the Union, through its officers and members, advised its employees regarding the procedures for filing claims for state unemployment benefits and filed the mass claim applications at the Union's office in Honolulu. Substantially all the claims for benefits filed with the DLIR were filed by the Union via the mass claim sheets.

On May 28, 1974, the striking members voted to reject a company proposal and it was not until June 13, 1974 that a second company proposal was accepted. TELCO's striking

employees began to return to work on June 14, 1974. The strike had lasted thirty-eight (38) days.

At a meeting at the Honolulu office of the DLIR on June 17, 1974, defendant Brown, senior examiner of the DLIR, scheduled an informal predetermination hearing for June 27, at which TELCO and the Union were to supply data to enable Brown to determine, with respect to the TELCO strikers, solely whether they were disqualified for unemployment benefits because their "unemployment is due to a stoppage of work which exists because of a labor dispute at the . . . establishment . . . at which he is . . . employed." HRS Chapter 383-30(4). The only issue before Brown would have been whether a "stoppage of work"[1] can be established by TELCO. Unless TELCO were to be able to convince Brown that it had experienced a "substantial curtailment of operations" during the strike, the strikers would be paid unemployment compensation for all strike lost time, save the first seven days. Thereafter in accordance with the provisions of the state act, TELCO would be forced to replenish the state's unemployment compensation fund by paying therein some $832,000.

After the instant complaint was filed, the Pacific Business News of June 20, 1974 reported that John Guzman, business manager of the Union, stated for publication that the Union had notified its members that they could expect to receive unemployment benefits for the period of the strike and that "a lot of the workers have already spent the money without actually getting it and this is worrying our people." More-

[794]

1. As that phrase had been interpreted and applied by the state in *Akahane, supra,* and expanded in *Gaspro, supra,* and *Meadow Gold, supra.*

over, Guzman was reported as saying that TELCO's opposition to the payment of unemployment benefits manifested an anti-union attitude on the part of TELCO. The Union has not denied these reports.

Although the strike has ended, TELCO and the Union still have a collective bargaining agreement, but TELCO, by state law, is nevertheless still forced into the position of litigating before the DLIR the question of whether its employees who struck should be entitled to receive unemployment compensation benefits. If the benefits are paid they would be charged against TELCO's account, thus forcing TELCO to pay some $832,000 in additional unemployment tax contributions, during 1975. The position of the DLIR is that if the information requested of TELCO did not show a "stoppage of work" as interpreted by the Hawaii decisions, *supra,* and the strikers were otherwise eligible, they would be paid unemployment benefits for the four weeks and three days of the strike remaining after the first excluded week.

Legal Issues

The underlying question is whether Hawaii's DLIR is wrongfully intruding in a labor dispute by making available unemployment benefits to strikers who would qualify therefor under the Hawaii Unemployment Compensation laws. The problem is whether such state action as has been heretofore taken in *Meadow Gold* and Hawaiian Electric alters the relative economic strength of Union vs. employer and thus enters the field preempted by the national policy guaranteeing free collective bargaining, in violation of the Supremacy Clause of the Constitution. Although the strike is ended, the problem is certainly not moot inasmuch as the state proposes to proceed with its hearings to determine whether or not TELCO's operations and revenues were substantially disturbed by the strike and whether or not the strikers are entitled to unemployment compensation.

Although there is no certain evidence as to the extent which the hope of receipt of unemployment compensation by the strikers affected the continuation of the strike, nevertheless from the activities of the Union in assisting in mass applications for benefits as well as the Union's characterization of TELCO's opposition to payment of unemployment benefits as manifesting "an anti-union attitude on the part of TELCO", strong inferences could be drawn that the Union at least felt that the receipt of unemployment compensation was of considerable importance in its arsenal of strike weapons.

None of the striking employees has as yet been actually determined to qualify for unemployment benefits because (a) there has as yet been no determination that TELCO's business has been substantially curtailed, i.e., that TELCO had 20% or more decline in revenue (which was indicated as a possibly relevant base in *Meadow Gold*), nor (b) has there been any actual processing of the strikers' applications to see if any has a per se disqualification under the state act. Assuming, however, that TELCO cannot show that its net revenue was substantially disturbed, then it is clear that almost if not all of the strikers would qualify for unemployment benefits. It therefore follows that the issue of irreparable harm arises because the prospective provision of economic aid to the strikers with a concomitant tax penalty upon the employer could be held to impermissibly and adversely affect the collective bargaining process.

Legal Analysis

It is now well settled that state laws may not be used to restrict activities protected by either § 7 or § 8 of the NLRA, 29 U. S. C. §§ 157, 158.[2] The instant problem, however, is one

2. *See Garner* v. *Teamsters Local 776*, 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228 (1953); *Building Trades Council* v. *Kinard*

(Footnote continued on next page.)

which does not arise out of activities specifically protected or proscribed under those two sections. Hawaii's unemployment laws, like those of the other states, were fostered by the national unemployment insurance legislative policy of the 1930's and were enacted following The Depression. All of the then 48 states enacted such laws in 1936 and 1937. Hawaii's Act was passed in 1939. There was no question that the states intended to be "neutral" in labor disputes.[3]

The notion of state neutrality ignores the realities of state and national governmental intervention in labor relations by means of minimum wage laws, workmen's compensation, the Wagner Act and the Taft-Hartley Act. The federal as well as the state legislative purpose for unemployment pay is "to provide real security against the hazard of unemployment—the weekly benefits should be sufficient to cover the basic necessities of most claimants and their families without requiring them to resort to relief. . . ."[4] The definition of an unemployed individual in most of the state laws does not distinguish between the individual who is totally unemployed and without wages, the one who has no regular job, but picks up some work and earnings, and the individual who has not been separated from his regular

(Footnote continued from preceding page.)

Construction Co., 346 U. S. 933, 74 S. Ct. 373, 98 L. Ed. 423 (1954); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959); *Teamsters Local 20* v. *Morton*, 377 U. S. 252, 84 S. Ct. 1253, 12 L. Ed. 2d 280 (1964).

3. As noted by Shadur in his article on "Unemployment Benefits and the 'Labor Dispute' ", U. Chi. L. Rev. 294, 296 (1949-50), this view of "neutrality" is notable at least for its age, having been a basis in the 1911 British Act.

4. Unemployment Insurance Legislative Policy—Recommendations for State Legislation—1962, U. S. Department of Labor, Bureau of Employment Security, No. U-212, at 10.

employment but has had his hours cut and his wages substantially reduced.[5]

As pointed out by Archibald Cox in his Harvard Law Review article on "Labor Law Preemption Revisited":[6]

> "An appreciation of the true character of the national labor policy expressed in the NLRA and LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests."

The basic and ultimate problem before this court is to determine whether or not Hawaii's own Unemployment Compensation Act as intepreted, interferes with the working out of the national policy of encouraging self-organization and collective bargaining without state interference in the use of the economic weapons available to both labor and management.

The factual situation found in both *Akahane* and *Gaspro* is not involved here. Each of those cases arose out of an organizational strike. Within a relatively short time in each case the strikers had lost their jobs—permanently. The same was not true in *Meadow Gold,* and, as here also, the strikers knew that sooner or later they would return to *their* old jobs. Their unemployment was temporary and self-induced.

Times have changed since the 1930's and 1940's and 1950's when the big employers had massive economic muscle, and fractionated unions had little. Today a company union or a purely local union, as a practical matter, no longer exists. Local units are almost uniformly but a segment of a nation-wide union. One no longer talks of the giant employers—it is of the giant

5. *Id.* at 9.

6. 85 Harv. L. Rev. 7, 1352-53 (1972).

unions, the IBEW, ILWU, UAW, Teamsters, AFL-CIO. In this local case the IBEW had over 3,300 members out on strike against TELCO.

[796]

As in *Allen-Bradley* v. *Board,* 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154 (1942), in the context of this case it is not necessary to treat Hawaii's Unemployment Compensation Act as an inseparable whole. Here the focus is on only one narrow segment of that Act and its intepretation by Hawaii's courts. The sole question is whether the stoppage of work section, *supra,* as Hawaii has actually treated it, conflicts with the NLRA. Certainly the NLRA was not *designed* to preclude a state from giving aid to a striker who had actually lost his job, as in *Lawrence Baking Co.* v. *Michigan City,* 308 Mich. 198, 13 N. W. 2d 260 (1944), and in *Akahane* and *Gaspro.* Here, however, TELCO strikers' jobs were not at all terminated; employment was only suspended for the duration of the strike. Both management and Union and its striking members knew that resumption of employment upon the end of the strike would follow "as the day the night."

As said by Justice Frankfurter in dissent in *Hill* v. *Florida,* 325 U. S. 538, 552, 65 S. Ct. 1373, 1380, 89 L. Ed. 1782 (1945), in this state-federal conflict "we are in the domain of government and practical affairs" and state action may not be stifled "unless what the State has required, in the light of what Congress has ordered, would truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden."

It is in the context of today's realities and "practical affairs" in labor-management collective bargaining which, as this court sees it, has brought out The Court's opinion in *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974). There, employers whose plants were struck,

brought suit for injunctive and declaratory relief against New Jersey's state policy of holding workers engaged in an economic strike as eligible for public assistance through its welfare program. The employers claimed that the regulations according benefits to striking workers were invalid because they interfered with the federal labor policy of free collective bargaining expressed in the Labor Management Relations Act. Prior thereto, the district court, following the "well-settled law" set forth in *ITT Lamp Division* v. *Minter,* 435 F. 2d 989 (1st Cir.), cert. denied, 402 U. S. 933, 91 S. Ct. 1526, 28 L. Ed. 2d 868 (1971), ruled that the appropriate forum for the problem was Congress and that the New Jersey practice of giving aid to striking workers did not violate the Supremacy Clause. The complaint was then dismissed. On appeal, the court did not reach the merits but remanded the case with instructions to vacate and dismiss for mootness. 469 F. 2d 911, 922 (3rd Cir. 1972).

To the surprise certainly of this court, the court stated:

> ". . . New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent upon executive discretion. Employees know that if they go out on strike, public funds are available. The petitioners' claim is that this eligibility affects the collective-bargaining relationship, both in the context of a live labor dispute when a collective-bargaining agreement is in process of formulation, *and* in the ongoing collective relationship, so that the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers. It *cannot be doubted* [emphasis added] that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every collective-bargaining agreement, and is a factor lurking in the

> background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly, has
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> [797]
>
> ruled out such assistance in its calculus of laws regulating labor-management disputes. In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive of the State of New Jersey. That claim deserves a hearing." *Super Tire,* 416 U. S. 115, 94 S. Ct. 1694, 1699, 40 L. Ed. 2d 1 (Footnote omitted.)

What The Court found concerning the pervasive effect of the availability of state welfare assistance during strike-induced work stoppages upon collective bargaining agreements and incipient labor contracts in New Jersey have in this TELCO case been shown as having equal or greater effect. As indicated heretofore, the labor leaders themselves instantly assisted all strikers in filing applications for unemployment compensation and, when this present action was started, condemned TELCO's action as manifesting an anti-union attitude.

Hawaii's requirements here gave to the strikers the expectation of receiving (after the first week) about $280,000 per week for each week the strike continued. TELCO on the other hand was faced with the problem of trying to keep its own business operations from completely collapsing, knowing that if the operations were not ultimately found to have been substantially curtailed, i.e., cut by at least 20%, they would have to pay (after the first week) about $190,000 per week in unemployment tax contributions for each week of the strike. Moreover, such tax "contribution" payments, even if ultimately refunded by the state would be returned *without interest!*[7]

7. HRS Chapter 383-76.

Conclusions of Law

It is in the above "domain of government and practical affairs" that this court must rule upon TELCO's present request for a preliminary injunction.

From the preceding facts and analysis, it appears to this court that, in dollars and cents, TELCO will instantly be faced with the costs of presenting its case to the DLIR on the quantum of business injury it suffered during the strike. From the actions of the DLIR from the outset of the strike, as well as from its February Hawaiian Electric ruling, TELCO has reasonable grounds to believe that the DLIR will find that its operations were not "substantially" impaired and it will be ordered to "contribute" some $832,000 into the state's unemployment fund —with no certainty that that money will be returned (without interest) via rate increase or otherwise.[8]

Guzman's statements to the press clearly show the solid impact of TELCO's present challenge of the state act upon TELCO's labor-management relations.

This court finds that TELCO's showing of threat of irreparable harm, if the requested preliminary restraint is not granted, is sufficient to comply with the first of the four factors involved in preliminary injunction proceedings set forth in *King* v. *Saddleback Junior College,* 425 F. 2d 426 (9th Cir. 1970), *cert. denied,* 404 U. S. 979, 92 S. Ct. 342, 30 L. Ed. 2d 294 (1971).

As to the second factor, this court finds that the impact of a temporary restraint upon the state in its processing of the strikers' claims and determining TELCO's liability will be almost nil.

8. The state's argument that TELCO can suffer no monetary harm because it may charge off increased payments against the rate-making scheme and may get an increase in rates, borders on the frivolous. Not only does TELCO not have any *absolute* assurance that it will be able to so pass on such *expenses* to the public, but the argument bypasses the basic *legal* problem posed and the effect of the decision in this case on employer who, not having a state-controlled monopoly, must operate under America's free and harshly competitive economic scheme.

While the strikers themselves undoubtedly could use the anticipated unemployment compensation, there has developed no

[798]

inference that any are now on welfare. All have been regularly employed since June 13 (at higher pay), and all may reasonably expect that such employment will certainly continue.

This court's analysis of the legal inferences to be drawn from *Super Tire,* in the context of what would appear to have been a weaker case than that of TELCO's, induces this court to find TELCO has demonstrated a reasonable probability of success on the merits and so has satisfied the third factor.

There is no question as to the fourth factor. The Court in *Super Tire* recognized the public interest manifestly involved in labor-management disputes vis-a-vis state assistance to striking workers.

In short, TELCO's case is so closely analogous to *Super Tire* that this court would feel mandated thereby to state, as did The Court, TELCO's "claim deserves a hearing."

Ruling

TELCO's prayer for a preliminary injunction is granted.

TELCO's ability to pay in full for any costs and damages that might be suffered by either the state or the Union cannot be questioned. TELCO's bond, therefor, is fixed in the sum of Ten Dollars ($10.00).

TELCO's attorneys will prepare the necessary order.

All counsel will confer, within the next ten (10) days after the filing of the order, upon a schedule for briefing and argument of the underlying question here involved: Whether Congress explicitly or implicitly has ruled out Hawaii's statutory scheme of unemployment assistance in its federal calculus of laws regulating labor-management disputes. A hearing on such scheduling will be held on Friday, July 26, 1974, at 9:00 a.m.

APPENDIX D

Declaratory Judgment and Order

Nov. 17, 1975

As Amended Feb. 9, 1976

[405 F. Supp. 275]

UNITED STATES DISTRICT COURT

D. HAWAII

Civ. No. 74-140

Oct. 14, 1975

HAWAIIAN TELEPHONE COMPANY, a Hawaii Corporation,

Plaintiff,

and

HAWAII EMPLOYERS COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES, and CHAMBER OF COMMERCE OF HAWAII,

Intervenor-Plaintiffs,

vs.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS *et al.*,

Defendants,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1357, *et al.*,

Intervenor-Defendants.

[276]

Jared H. Jossem, R. M. Torkildson, Torkildson, Katz & Conahan, Honolulu, Hawaii, for plaintiff and intervenor-plaintiff Hawaii Employers Council; Lawrence M. Cohen, Lederer, Fox & Grove, Chicago, Ill., for intervenor-plaintiff Hawaii Employers Council.

Edward Jaffe, Cades Schutte Fleming & Wright, Honolulu, Hawaii, and Gerard C. Smetana, Borovsky, Smetana, Ehrlich & Kronenberg, Washington, D. C., for intervenor-plaintiffs Chamber of Commerce of the U. S. and Chamber of Commerce of Hawaii.

Ronald Y. Amemiya, Atty. Gen., of Hawaii, Frank Yap, Jr., Deputy Atty. Gen., Honolulu, Hawaii, for defendants.

Edward H. Nakamura, James A. King, Bouslog & Symonds, Honolulu, Hawaii, for intervenor-defendant IBEW. Local 1357.

Benjamin C. Sigal, Shim, Sigal & Tam, Honolulu, Hawaii, for intervenor-defendant IBEW, Local 1260, and Hawaii State Federation of Labor.

DECISION

PENCE, *District Judge*.

Plaintiff Hawaiian Telephone Company (TELCO) alleges that the potential payment of unemployment compensation to TELCO strikers by the State of Hawaii Department of Labor and Industrial Relations (DLIR) impermissibly infringes upon and interferes with TELCO's rights to engage in free collective bargaining, a field of activity preempted by Congressional regulation. This court granted a preliminary injunction against the DLIR in a previous decision on the same case. *See Hawaiian Telephone Company* v. *State of Hawaii*, 378 F. Supp. 791 (D. Haw. 1974). The jurisdictional basis, applicable state law,

[277]

preliminary findings of fact[1] and legal analysis set forth in that decision are incorporated in this decision without repetition here.

Several union and employer organizations have intervened in this action.[2] The "hearing" mandated by *Super Tire Eng. Co.* v. *McCorkle,* 416 U. S. 115, 124, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974) has been lengthy.

Evidentiary Issues

If the First Circuit's observation in *ITT Lamp Division of Int. Telephone & T. Corp.* v. *Minter,* 435 F. 2d 989, 994-95 (1970),

> that welfare programs, supplying unmet subsistence needs to families without time limitation, address a more basic social need than does unemployment compensation, which attempts to cushion the shock of seasonal, cyclical, or technological unemployment by making available time limited benefits to individual workers, varying in relation to their prior earnings and without reference to demonstrated need

is accepted as true, then, as argued by plaintiffs, it would appear that The Court eliminated the need for a factual inquiry as to whether Hawaii's interpretation and implementation of its unemployment act affects the collective bargaining process, when The Court stated in *Super Tire*:

> The petitioners' claim is that [eligibility for public funds] affects the collective-bargaining relationship, both in the context of a live labor dispute when a collective-bargaining agreement is in process of formulation, *and* in the ongoing

1. Most of this court's preliminary findings were subsequently stipulated by the parties. Pretrial Order, Oct. 1, 1974.

2. Local 1357, International Brotherhood of Electrical Workers, AFL-CIO, which represents employees of TELCO; Local 1260, IBEW, AFL-CIO, which represents employees at Hawaiian Electric Company; Hawaii State Federation of Labor, AFL-CIO; Hawaii Employers Council, an association serving 650 employers in the field of industrial and labor relations; and the Chambers of Commerce of Hawaii and the United States.

> collective relationship, so that the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers. It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. (416 U. S. at 124, 94 S. Ct. at 1699)

Nevertheless, this court believed and therefore has ruled that an evidentiary hearing would be of assistance in the ultimate resolution of the problem before this court.

Findings of Fact

Expert Testimony

Both plaintiff and defendants proffered experts on the effect of the payment of unemployment compensation to strikers. For the plaintiffs, Glenn D. Meyers[3] in essence testified that employee decisionmaking with respect to negotiations and strikes is properly analyzed in cost-benefit terms. The employee compares what he expects to get in the way of settlement with his costs, primarily net lost wages due to striking, taking into account receipt of any outside funds. The defendants' expert conceded that money is a factor in determining behavior.[4]

Meyers examined the economic statistics of the TELCO dispute and determined that "the break-even point for the striker seeking an additional 1% increase would be two weeks without

[278]

[unemployment] benefits, and about five weeks if benefits are

3. Dr. Myers is an economic consultant and teacher, specializing in labor economics. Trial transcript [Tr.] Oct. 2-3, at 1-3.

4. Tr. Dec. 10-17, at 587.

received."[5] His model assumed that the receipt of state benefits affects only the worker's perception of *cost*.

The primary thesis of Stanley H. Ruttenberg, defendants' expert,[6] was that if unemployment compensation were a significant factor in collective bargaining, it would influence wages to be higher or strikes to be longer in those states which provide benefits than in those which do not. If statistics demonstrate the contrary, they prove that unemployment insurance is not a significant factor.[7]

The data upon which Ruttenberg based his hypothesis was founded primarily upon the strike experience in Rhode Island and New York, in which unemployment benefits are paid to all strikers after waiting periods of 7 weeks and 8 weeks respectively.[8] He compared this material with statistics for the balance of the United States, and also for 9 large industrial states, and concluded that the availability of unemployment compensation for strikers is not a factor in collective bargaining since strikes were not significantly longer in Rhode Island and New York than elsewhere.[9]

This court could give Ruttenberg's evidence little weight because of the many variables that were involved in the length of strikes, *e. g.*, local union strength or regional economic conditions, *see Grinnell Corp.* v. *Hackett,* 475 F. 2d 449, 459 (1st Cir. 1973), and his control groups include states that pay un-

5. Partial Tr. Oct. 2, at 3-4; Tr. Oct. 2-3, at 136-37.

6. Mr. Ruttenberg is a labor economist and consultant, former Assistant Secretary of Labor for Manpower, and former economic advisor to Secretary of Labor W. Willard Wirtz. Tr. Dec. 10-17, at 283-86.

7. *Id.* at 322-23.

8. R. I. G. L. §§ 28-44-14 and -16 (Supp. 1971); N. Y. Labor Law §§ 590(9), 592(1) (McKinney 1965).

9. Tr. Dec. 10-17, at 334, 336-37, 339; Local 1260 Exhibits 3-6.

employment benefits to strikers.[10] Moreover, the unemployment scheme for strikers in Rhode Island and New York is so different from Hawaii's as to make his thesis irrelevant. The same general criticism of uncontrolled variables applies to Ruttenberg's wage comparison studies.

Neither expert was of major assistance to the court, although the court believes that Meyers' thesis had a greater degree of validity than Ruttenberg's.

Statistical Findings

Thirteen out of 272 strikes (4.8%) in Hawaii between 1964 and 1973 resulted in compensation paid to strikers.[11] During that period 16.1% of the total man-days lost due to strikes occurred in strikes in which compensation was paid.[12] In all but one case, unemployment benefits were received after the strike had been settled.[13]

Between 1966 and 1972, the average duration of strikes for which strikers received unemployment compensation was 64.4 days. During the same period, the average length of strikes for which benefits were not paid was 29.9 days.[14] From this relatively narrow base, it would appear that the availability of unemployment compensation does tend to lengthen the duration of strikes in Hawaii.

10. *E.g.,* Hawaii, and Michigan, *see Dow Chem. Co.* v. *Taylor,* 57 F. R. D. 105 (E. D. Mich. 1972).

11. Local 1260 Exhibits 2, 13 (court's computations). The data unfortunately include all strikes, whether within the national jurisdiction or not.

12. *Ibid.*

13. Tr. Dec. 10-17, at 656-58.

14. Local 1260 Exhibits 2, 13 (court's computations). The latter figure omits all those strikes lasting less than six days, since Hawaii has a one-week waiting period before any benefits are payable.

Declaratory Judgment and Order

The TELCO Balloting

The strike began on May 7, 1974. On May 28, 1974, the TELCO employees rejected by a 2-to-1 margin a first tentative agreement that had been reached by the negotiators.[15] Following this rejection, Director of Labor Hasegawa was paraphrased in an article in the Honolulu *Advertiser* on June 1 as stating:

> [T]he company has challenged every claim for unemployment compensation—"which they have every right to do."
>
> He said a hearing between the company and union representatives may be held in about two weeks.[16]

On June 5 another tentative agreement was reached and submitted to the membership for balloting by mail. On June 13 this second agreement was approved by more than 3-to-1.[17]

Plaintiffs not implausibly contend that the sudden shift in vote was caused by the company challenge to the payment of unemployment compensation with a concomitant dampening of the employees anticipation of the state's monetary aid.

Raymond Victor, assistant business manager of Local 1357, testified that the shift was due to the shortening of the contract period and that the second ballot was not taken at a mass meeting but by mail.

This court could not find that either theory was necessarily valid.

The Employer Perspective

Donald M. Kuyper, Vice President of Personnel for TELCO, testified that the potential availability of unemployment benefits affected his company's offers. As negotiations were about to begin, Kuyper was aware that benefits had just been paid in

15. Pretrial order, Oct. 1, 1974, at 13-14.
16. *Id.* at 14-15; Plaintiffs' Exhibit 15.
17. Pretrial order, Oct. 1, 1974, at 15-16.

the Hawaiian Electric Company strike,[18] and that the potential cost to TELCO as a result of increased payroll taxes, if benefits were paid, was in excess of $100,000.[19] He was under the impression that the union at TELCO had been checking on the availability of welfare and unemployment benefits,[20] and the possibility of strikers getting unemployment benefits was of "major significance . . . going into negotiations."[21]

After the strike had begun, Kuyper observed that the union was actively assisting strikers to file their unemployment claims.[22]

Although Kuyper did not make such a calculation during negotiations, the contribution formulae are readily available for any employer to estimate his increased tax exposure for any length strike for which its employees receive benefits. In TELCO's case, the increase is $754,000, over the two years following the strike.[23] When compared with the estimated extra

[280]

$320,000 the initial contract would have cost the company, the

18. Tr. Oct. 1, at 69. Bargaining began just after the award of benefits to Hawaiian Electric Company strikers of approximately $100,000 was announced.

19. Tr. Oct. 1, at 105. Since Hawaii's unemployment compensation statute bases employer contributions on their experience ratings, *i.e.*, the amount of benefits paid their employees, an employer's decision to keep operating during a strike may lead to an increase in his tax rate. *See* H.R.S. §§ 383-63 to -70 (1968 & Supp. 1974).

20. Tr. Oct. 1, at 71.

21. *Id.* at 72: "The closeness of the Electric Company case was certainly in my mind; in addition to that, however, there were other factors that I think were also very relevant. One was that we had come through a recent period of layoffs, there was a great concern for job security. Secondly, there had been a lot of articles in the paper in relationship to the cost of living—the increased cost of living and also, of course, many articles in relationship to the controls coming off, so that those three plus the unemployment benefits were probably the four most significant things that I had in mind as we entered the negotiations."

22. *Id.* at 73-74, 82-83.

23. Pretrial order, Oct. 1, 1974, App. A (lodged Sept. 18, 1975).

magnitude of this tax burden leads to the inescapable inference that there will be occasional instances where it is cheaper for an employer to accede to union demands he otherwise would have rejected, than to run the risk of a prolonged strike.

Bernard T. Eilerts, Executive Vice President of the Hawaii Employers Council during the TELCO strike and at the time of trial, with a background of extensive experience in advising employers and participating directly in bargaining,[24] testfied that the potential availability of unemployment insurance is generally considered in determining bargaining strategy.[25]

Eilerts concluded that the potential availability of benefits lengthened the TELCO strike and generally leads to higher settlements where the employer realizes it has to keep operating during a strike.[26]

Neither management witness could quantify the impact of Hawaii's unemployment insurance law on collective bargaining.[27]

The very fact that the employers reasonably perceive the potential or actual availability of benefits as an aid to their bargaining adversary *itself* evidences an effect upon the collective bargaining process.

The Hawaii "stoppage of work" test requires an inquiry into how much the employer's business was curtailed.[28] This administrative study by the state unemployment division requires exhaustive examinations as to the volume, cash flow, and services affected.[29] In other words, the state seeks to determine how effective the strike has been, which is precisely one of the things

24. Tr. Oct. 1, at 150, 158, 160-63.
25. *Id.* at 154, 155-56, 164, 274, 278-79.
26. *Id.* at 274-75.
27. *Id.* at 250-52, 275, 299, 339, 341.
28. *See Meadow Gold Dairies* v. *Wiig,* 50 Haw. 225, 437 P. 2d 317 (1968).
29. Pretrial order, Oct. 1, 1974, at 10.

a union would be curious to know—as it considers whether to continue the dispute, and what its bargaining position will be. But for the state involvement, TELCO would *not* give this information to the union.[30]

The Union Perspective

Employee finances are an important aspect of strike planning because they are key determinants of how long the employees can stay away from work. As a result, many unions in Hawaii send questionnaires to their members to help them analyze their resources in preparation for a potential strike.[31]

Defendants' expert, Mr. Ruttenberg, conceded that (1) the existence of a strike fund may be a significant factor in the results of collective bargaining;[32] (2) the existence of a large available source of funds during a strike is used by unions to impress employers that the union has the resources to back up a threat to strike;[33] and (3) the loss of income to strikers is a factor in the minds of strikers when deciding whether to accept an employer's collective bargaining offer.[34] In short, he admitted that a fair summary of his position was that the amount of money a striker is losing "goes through his mind along with other factors and it may have an impact on his decision or does have an impact . . .";[35] and that the source of a striker's funds, whether it be unemployment compensation or union benefits from a strike

30. Tr. Oct. 1, at 83-84.
31. Tr. Dec. 10-17, at 183, 232, 250.
32. *Id.* at 465-66.
33. *Id.* at 467.
34. *Id.* at 581-83.
35. *Id.* at 586.

fund, makes no difference with respect to the impact on the [281] striker's decision.[36]

The benefits potentially available to TELCO strikers constituted a large percentage of their net take-home pay.[37]

Various union officials testified that no thought was given to the availability of unemployment compensation either in preparation for negotiations, during negotiations, or during the course of strikes.[38] However, Local 1357's assistant business manager, Raymond Victor, was asked by a TELCO employee about the possibility of benefits, at a membership meeting a few months before the TELCO strike. Victor testified that he told the employees "there's no way to determine whether anybody is going to ge paid."[39] Then he said he supposed that the employee

> was trying to tell us to get the information before time so that they would know whether they should make up their mind to strike or not . . . .
> . . . I assume he was asking that question to determine whether they should use that as a factor whether they wanted to consider going on a strike.[40]

While certainly not conclusive, a necessary inference to be drawn from his testimony is that at least one union official *believed unemployment benefits to be* a potentially important

36. *Id.* at 587. Notwithstanding the foregoing admissions, Ruttenberg maintained in his testimony that funds offsetting wage losses were not important "when the chips are down." *Id.* However, he could not name a single other writer who supports his position, *id.* at 491-95, and could not explain how other well-recognized experts have taken a diametrically contrary position, *see id.* at 487, 647-48.

37. *See* Pretrial order, Oct. 1, 1974, App. B.

38. Tr. Dec. 10-17, at 51, 151-52, 155-56, 166, 215-16, 229.

39. *Id.* at 51.

40. *Id.* at 60-61.

factor, or thought that some of the membership believed them to be potentially important.[41]

After the TELCO strike was settled and this case was about to come to trial, a leaflet was distributed to TELCO workers bearing the typewritten attribution "Gwen Pascua," a shop steward for Local 1357.[42] The leaflet was a call to rally in protest against the employer's legal action:

> [T]he ink was hardly dry on the contract when the G. T. & E. bosses showed us what they thought of the truce. They sent their fancy lawyers to federal court to sue the State to prevent payment to us of our unemployment compensation, which we were entitled to under State law. By our labor we earned the profits and paid the state taxes that finance the State Unemployment Fund. Now the company, with the help of the courts and their Big Business allies in Hawaii, and all over the U. S., is trying to rob us of our benefits, to the tune of hundreds of thousands of dollars, and *trying to undermine our ability and right to strike in the future.*
>
> * * * * *
>
> We must realize that all workers in Hawaii and in 25 other states will be hurt by a bad decision by Judge Pence. Don't we have a responsibility to carry our struggle through, now that the bosses have picked up the club to use against us and all workers, and beat back this attack and *defend our right and ability to strike?* Don't we have a responsibility to the many workers who supported us when we were on strike to make sure that our bosses' action in court [282] doesn't *cripple their own strikes in the future?*[43]

41. No amount of union disclaimer was capable of convincing all members that "there's no way to determine whether anybody is going to get paid." Some of the membership apparently believed they would be eligible for benefits. Tr. Oct. 1, at 261-62.

42. *Id.* at 88-91; Plaintiffs' Exhibit 42. Defendants did not dispute that she was the author of the leaflet, nor her position with the intervenor-defendant union, nor that she was acting within the scope of her authority as a steward.

43. Plaintiffs' Exhibit 42.

Since some union participants believe unemployment compensation to be a potentially important factor, this court cannot conclude that it is entirely extraneous to the collective bargaining process.

Factual Conclusions

From the preceding, as well as the facts found in this court's prior decision, this court finds: (1) 16.1% of total man-days lost are attributed to strikes in which compensation was paid; (2) the presence of potential unemployment benefits probably tends to lengthen strikes; (3) the employer's approach to bargaining is affected by the potential additional tax burden; (4) potential increases in tax contributions tend to make employers settle when they otherwise would not; (5) unions are given access to valuable confidential information about the success of strikes during the course of state administrative hearings on benefits; the appealability of those hearings is used as a bargaining chip; (6) employee finances are key determinants of the success of strikes and strike threats; (7) unemployment benefits, if granted, provide a large percentage of striking workers' take-home pay; (8) union members and officials perceive that unemployment benefits contribute to their ability to strike and maintain it. Therefore, this court finds that Hawaii's unemployment insurance statute as interpreted by the Hawaii Supreme Court palpably affected the labor relations between TELCO and the IBEW, and similarly affects all other Hawaii employers and unions in every collective bargaining conflict and "is a factor lurking in the background of every incipient labor contract"[44] where the employer may desire to carry on business during a strike.

44. *Super Tire Eng. Co.* v. *McCorkle,* 416 U. S. 115, 124, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974).

ANALYSIS OF THE FACTS AND THE LAW

The Social Security Act of 1935 did not set up a federal unemployment compensation system. Rather it made it possible for the states to establish their own systems and to provide incentives for them to do so.[45] State legislatures had considered the matter of unemployment compensation prior to the Congressional enactment but most of them had defeated such bills, fearing that a tax to finance their systems would handicap their industries in competition with those of other states.[46]

Congress overcame this problem and accomplished its objective primarily by imposing a national payroll tax on employers against which a credit is allowed for contributions made by them to qualifying state unemployment compensation funds.[47]

While this country's unemployment insurance scheme is a cooperative state-federal venture, *see Steward Machine Co.* v. *Davis,* 301 U. S. 548, 587-89, 57 S. Ct. 883, 81 L. Ed. 1279 (1937), the mere fact that the unemployment laws are under a federal umbrella does not in itself alter the preemption problem. See *Nash* v. *Florida Industrial Commission,* 389 U. S. 235, 88 S. Ct. 362, 19 L. Ed. 2d 438 (1967). The role Congress

[283]

played in shaping the nature of state laws is materially relevant to the subject of Congressional intent to preempt, *see infra.* It must be kept in mind that this is not a case of conflict between

45. S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935).

46. *Id.* at 11; *Steward Mach. Co.* v. *Davis,* 301 U. S. 548, 587-89, 57 S. Ct. 883, 81 L. Ed. 1279 (1937).

47. S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935); *see* 26 U. S. C. A. §§ 3301-09 (1967, Supp. 1975) (Unemployment Tax Act); 42 U. S. C. A. §§ 501-04 (1974) (grants to states for unemployment compensation administration); *id.* §§ 1101-08 (unemployment trust fund). If a state unemployment compensation law does not meet federal standards, the tax credit to its industries is denied. 26 U. S. C. A. §§ 3302(a)(1), 3304 (1967, Supp. 1975).

two federal laws: the statute being challenged is not the Social Security Act but rather the Hawaii Employment Security Law as interpreted by its courts.[48]

Labor Law Preemption

The law of labor preemption to date has focused on state interference with employee activity protected or prohibited by the federal labor laws.[49] The principles of those cases, however, provide initial steps in analyzing whether state interference with employer activity, or state assistance to employee activity, is likewise preempted.

It is now axiomatic that state laws may not interfere with employee activities *protected* or *prohibited* by §§ 7 and 8 of the N. L. R. A.[50] Under the Supremacy Clause, since the Act guarantees federal rights, state laws that conflict with the federal legislation are invalid. *See Garner* v. *Teamsters Local 776,* 346 U. S. 485, 490-91, 74 S. Ct. 161, 98 L. Ed. 228 (1953); *San Diego Building Trades* v. *Garmon,* 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959); *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 276, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971). The *Garmon* principle, however, is not a constitutional rule. *Retail Clerks Local 1625* v. *Schermerhorn,* 375 U. S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963).

Local 20, Teamsters v. *Morton,* 377 U. S. 252, 256-61, 84 S. Ct. 1253, 12 L. Ed. 2d 280 (1964), sets out a basic rationale for analyzing previous labor law cases and bringing them within a unified system of preemption analysis.[51] *Morton* dealt with

48. *See New York State Dep't of Social Serv.* v. *Dublino,* 413 U. S. 405, 93 S. Ct. 2507, 37 L. Ed. 2d 688 (1972).

49. *See* Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337 (1972).

50. 29 U. S. C. A. §§ 157, 158 (1973 & Supp. 1975); *see* Cox, *supra* note 49, at 1340-51, and cases cited therein.

51. *See* Cox, *supra* note 49 at 1350-51.

union activity that was clearly neither protected nor prohibited by federal labor laws, so the issue did not fit within any of the previous cases. The Court ruled, *id.* at 259-60, 84 S. Ct. at 1258:

> Allowing [the activity] is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. . . . If the Ohio law . . . can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe . . . the inevitable result would be to frustrate the congressional determination . . . and to upset the balance of power between labor and management expressed in our national labor policy.

Professor Archibald Cox, in preemption,[52] finds the key Congressional labor policies are the right to organize and to strike; and the solution of labor differences through collective bargaining enforced by economic sanctions.

It must be recognized that there is both an explicit and an implicit framework to the labor laws. The Taft-Hartley Act[53] explicitly forbids certain employer and union activities. Impliedly, the fact that there is no duty to reach agreement—merely a duty to bargain in good faith[54]—means there is freedom to bring economic pressure to bear on collective bargaining.

[284]

See American Ship Building Co. v. *NLRB,* 380 U. S. 300, 85 S. Ct. 955, 13 L. Ed. 2d 855 (1965).

Congress, sometimes through the NLRB, attempts to balance the competing interests. All rules involve "nice judgments"[55] as

52. *See id.* at 1351-59.

53. Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified in scattered sections of 18, 29 U. S. C. A.).

54. 29 U. S. C. A. § 158(d) (1973 & Supp. 1975).

55. Cox, *supra* note 49, at 1353.

to whether one approach or another would be more likely to obtain Congressional objectives. Nevertheless, the states, after *Morton*, cannot enforce their own views as to what the proper balance of those interests might be. Even in the absence of direct conflict between state and federal laws, the national scheme preempts the state power to act.[56]

While *Morton* explains the prior cases that deal with state infringement upon *employee* activity, it also applies to the issues that now face this court: state *aid to employee* activity or *infringement* of *employer* activity.[57]

The underlying problem in every preemption case is to determine the *outer limits* of Congressional concern; beyond these, there is no preemption. A court cannot "declare pre-empted all local regulation that touches and concerns in any way the complex interrelationships between employers, employees, and unions; obviously, much of this is left to the States." *Motor Coach Employees* v. *Lockridge, supra* 403 U. S. at 289, 91 S. Ct. at 1919.

Congress passes the federal labor laws within a larger framework of state law that creates property rights and regulates general welfare under the Tenth Amendment. State laws fall outside the limits of Congressional preemption if they

> apply to the general public . . . without regard to whether the individual is an employer, union, or employee concerned with unionization or a labor dispute.

56. There is no part in the formula for a "balancing" of federal and state interests, as suggested by the First Circuit in *Grinnell Corp.* v. *Hackett,* 475 F. 2d 449 (1st Cir. 1973), and *ITT* v. *Minter,* 435 F. 2d 989 (1st Cir. 1970).

Head v. *New Mexico,* 374 U. S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963), and *Buck* v. *California,* 343 U. S. 99, 72 S. Ct. 502, 96 L. Ed. 775 (1952), inquire only as to whether there is a conflict between the statutes, but do not balance the interests underpinning them. Likewise, all the labor cases cited in the text *supra* do not refer to a weighing of interests.

57. *See* text accompanying notes 3-43 *supra.*

* * * * *

> It is only where the state law . . . is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes that the likelihood that its application . . . will upset the balance struck by Congress is so great as to require exclusion of state law unless Congress has provided otherwise.[58]

The "stoppage of work" test of striker eligibility for unemployment compensation, as interpreted by the Hawaii Supreme Court, inquires directly into the success or failure of a strike to close down an employer's business, *e.g.,* benefits may be paid only if the employer keeps its operation substantially ongoing. *See Hawaiian Telephone Co.* v. *State of Hawaii,* 378 F. Supp. 791, 792 (1974) (decision on preliminary injunction). By focusing on the effect of collective action by employees upon the employer's business operations when the parties are in the throes of a collective bargaining conflict, it impinges upon "the very subject addressed by Congress in the NLRA," and therefore is preempted,[59] unless Congress has provided otherwise.[60]

[285]

Congressional Intent

At the very inception of the problem of trying to find "the intent of Congress," it must be recognized that for the most part, "the principle of pre-emption that informs our general national labor law was born of [the Supreme] Court's efforts, without the aid of explicit congressional guidance." *Motor Coach Employees* v. *Lockridge, supra,* 403 U. S. at 286, 91 S. Ct. at 1918. The cooperative federal-state nature of our unemployment laws,[61]

58. Cox, *supra* note 49, at 1355-56.

59. *Id.* at 1357.

60. *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 297, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971).

61. *See* notes 45-48 *supra* and accompanying text.

however, has from time-to-time brought forth expressions of Congressional views on the payment of unemployment benefits to strikers.

Congess itself, in formulating the District of Columbia laws has always excluded strikers from unemployment benefits.[62] Congress passed the first provision simultaneously with the Social Security Act of 1935.

Congressional creation of policy for the District of Columbia, however, cannot be taken as an absolute in gauging its intent nationally. Because the District has no Congressional vote, Congress legislates for the District in a relative political vacuum, compared with political pressures upon it in formulating national legislation. At the most, one can conclude that Congress *might* have wished the District's policy upon the states *if* it did not have to heed its several constituencies.

Defendants argue that the Social Security Board, "certainly knowing the intent of Congress, approved state laws providing for unemployment compensation for strikers."[63] This fact is immaterial, since the Board was mandated to approve all state laws that met minimum conditions specified by Congress.[64]

Defendants also point to Congressional inaction in 1935 on several recommendations that state laws be required to deny benefits to strikers.[65] Careful examination of the legislative record, however, does not reveal whether Congress ever expressly

62. Since 1935, the law in the District of Columbia, although amended, has always excluded strikers. Act of Aug. 28, 1935, ch. 794, § 10(a)(6), 49 Stat. 946; Act of June 4, 1943, ch. 117, § 10(f), 57 Stat. 100; Act of Aug. 31, 1954, ch. 1139, § 10(f), 68 Stat. 988.

63. Brief for Locals 1260 and 1357, and Hawaii State Federation of Labor, at 25.

64. S. Rep. No. 628, 74th Cong., 1st Sess. 47 (1935); *see* 26 U. S. C. A. § 3304(a) (1967, Supp. 1975).

65. *Hearings on S. 1130 Before the Senate Comm. on Finance,* 74th Cong., 1st Sess. at 228, 472, 959 (1935).

considered these recommendations, all of which were contained in lengthy written reports, and none of whose proponents urged them upon the Congressional attention during hearings.[66]

Subsequent Congresses considered various proposals to eliminate benefits to strikers. All the legislative history argued by the parties here was fully explored by the First Circuit in *Grinnell, supra,* at 454-57, in the context of a challenge of the Rhode Island law which, similar to New York's, provided for payment of unemployment benefits to strikers after a six-week waiting period subsequent and in addition to the general waiting period for all unemployed claimants.

For the purpose of this decision, the *Grinnell* opinion's reference to Nixon's proposal in 1969 to deny unemployment benefits to strikers must be amplified. Nixon's message accompanying the proposal explained the strike provision as follows:

> *Workers on Strike.*—The unemployment tax we require employers to pay was never intended to supplement strike funds to be used against them. A worker who chooses to exercise his right to strike is not involuntarily unemployed. [286]
>
> In two States, workers on strike are paid unemployment insurance benefits after a certain period. This is not the purpose of the unemployment insurance system.
>
> *I propose a requirement that this practice of paying unemployment insurance benefits to workers directly engaged in a strike be discontinued.*

Hearings Before the Committee on Ways and Means of the House of Representatives on H. R. 12625, 91st Cong., 1st Sess. 12 (1969).

The draft amendment contained the following provision to be inserted after paragraph (6) of § 3304(a) of the Internal Revenue Code:

66. *Id.* at 113, 121, 133, 223, 237, 238, 463, 959.

> (10) compensation shall not be paid *by reason of the expiration of a specified period of time* to an individual who has been disqualified under a labor dispute disqualification provision in such State law; (emphasis added) (*id.* at 25)

Similarly, the Taft-Hartley Act as passed by the House containing a provision that would have removed a striker from the status of employee if he was receiving unemployment compensation (see *Grinnell* and briefs) was also aimed at New York and Rhode Island statutes, even though the language was broad enough to affect strikers in Hawaii today.

The House provision, deleted in conference with the Senate, read:

> employee . . . shall also include any individual whose work has ceased as a consequence of a current labor dispute (unless such individual has been replaced by a regular replacement, or has obtained other regular and substantially equivalent employment, or is receiving unemployment compensation from any State). . . .

1 NLRB Legislative History of the LMRA 161 (1947).

The House Committee Report accompanying the bill explained the purpose of the provision as follows:

> *A few States pay strikers after the fifth, sixth, or seventh week of a strike.* This clearly is a perversion of the purposes of the social security laws . . . . We therefore have provided that a striker's status as an "employee" stops when he starts receiving unemployment compensation from any State. He may receive relief from his union, from local welfare funds, or from charity without losing that status. (Emphasis added)

Id. at 303-04.

The minority report, *id.* at 359, said:

> The bill apparently intends to discourage States from paying unemployment compensation to strikers by penalizing employees who accept unemployment compensation. Under the Social Security Act, however, the determination of those matters was advisedly left to the States.

From this court's analysis it seems unmistakable that by Congressman Mills' statement upon the 1969 legislation—"There are two States . . . which pay unemployment benefits when employees are on strike" (*Grinnell*, at 455)—he was referring to the New York and Rhode Island type of unemployment acts, acts which have a fundamental difference from Hawaii's, in the scope of their application.

There is no point in this decision to retrace the same road toward determination of Congressional intent that was so laboriously trudged by Judge Coffin in *Grinnell*. On the broad problem of payment of unemployment compensation to strikers, this court agrees with *Grinnell*, at 457 that "unambiguous Congressional intent is lacking" and (at 454):

> the existing legislative record is not sufficiently clear to establish Congressional intent either way, it strongly indicates Congressional awareness, the availability of opportunities to act, and Congressional action in closely related matters which would prove relevant *should the evidence on infringement and state interests be closely balanced.* (Emphasis added)

[287]

The "Work Stoppage" Provision

Neither from *Grinnell* nor from this court's own research is there any evidence that Congress was ever aware of the "work stoppage" problem imposed by the unemployment compensation act adopted in Hawaii and some other states.

As heretofore indicated, H. R. S. § 383-30 disqualifies one for benefits under "(4) Labor dispute. For any week . . . this his unemployment is due to a stoppage of work which exists because of a labor dispute at the . . . establishment . . . at which he is . . . employed."

"Like most other aspects of the Draft Bill, the stoppage of work requirement had its origin in the British Unemployment Insurance Acts",[67] social legislation which preceded the American acts by over 20 years. It was natural therefore for the American courts to look to the decisions of the British Umpires for precedent in the interpretation of what superficially appears to be simple language. Unfortunately, where employees and employers are at odds, "nothing is simple." Shadur[68] continues:

> When this country's fifty-one statutes were adopted, the phrase had long since acquired a settled construction from the British Umpires as referring "not to the cessation of the workman's labour, but to a stoppage of the work carried on in the factory, workshop or other premises at which the workman is employed." It is scarcely surprising that the overwhelming majority of appellate decisions in the United States have adopted the same interpretation. (Footnotes omitted.)

That this "settled construction" may have not been so simple and finite as stated by Shadur and assumed by American courts is shown in the July 1946 study of "Principles Underlying Labor-Dispute Disqualification" made by Marsile J. Hughes of the Illinois Division of Placement and Unemployment Compensation at the request of the Federal Bureau of Employment Security and sent to state unemployment agencies. After making a detailed analysis of the "Analytic Guide to Decisions by the [British] Umpire", Hughes states:

> [I]t is apparent that the British authorities in determining whether a stoppage of work existed looked first to see whether any job vacancies were created by the dispute.
>
> * * * * *
>
> Under the British interpretation of the word "stoppage" the individual is disqualified for benefits if his unemployment is due to a trade dispute so long as the job which he held continues to be vacant. It would be necessary for the claimant to show that the job vacancy had been filled in some way in order to effect a termination of his disqualification. Vacancies might be terminated by the return of the worker, by the hiring of a replacement, or by a readjustment of work operations.[69]

67. Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification,* 17 U. Chi. L. Rev. 294, 308.

68. *Ibid.*

Hughes' conclusions validate plaintiffs' contention that the Umpires' interpretation of "stoppage of work" would preclude payment of benefits to strikers unless they were permanently replaced or their jobs were eliminated.

American Decisions

Assuming the plaintiffs' version of the Umpires' decisions to be correct, it appears that the American courts that first considered the issue were correct in their results but used imprecise conclusitory language, just as did Shadur, with an almost inescapable overbroadening of the British rule.

The earliest case cited is *Magner* v. *Kinney,* 141 Neb. 122, 2 N. W. 2d 689 (1942). This involved a strike that began after an impasse in collective bargaining. There is no evidence that the strikers were replaced, and the action decreased total business transacted by the employer more than 30 per cent. The [288] court adopted what it believed to be the Umpires' construction, viz., " 'stoppage of work,' . . . is a substantial curtailment of work in an establishment, not the cessation of work by the . . . claimants." 2 N. W. 2d at 692. The court concluded that 30 per cent curtailment of business was "substantial" and denied benefits.

Lawrence Baking Co. v. *Michigan Unemployment Compensation Commission,* 308 Mich. 198, 13 N. W. 2d 260 (1944),

69. M. Hughes, *Principles Underlying Labor-Dispute Disqualifications* 26 (1946).

is repeatedly cited as the leading case on the issue. The case arose from an organizational strike, in which 16 union members of plaintiff's 98 employees went on strike, disrupting operations for about 15 minutes. The employer "immediately" hired replacements and notified the strikers of this fact. *Lawrence Baking* did not rely directly on incorrect reading of the Umpires' construction of work stoppage, although it quoted at length from *Magner*. Rather, it argued that the interpretation given Nebraska's law by the *Magner* court is part of the evidence that Michigan intended the same construction when it later adopted similar statutory language. 13 N. W. 2d at 262-63. The court affirmed the award of benefits to the strikers, the same result that would have obtained had the Umpires' approach been followed, since the strikers had been replaced.

By the time the Hawaii Supreme Court ruled in *Inter-Island Resorts* v. *Akahane*, 46 Haw. 140, 377 P. 2d 715 (1962), the American version of the work stoppage test was firmly ensconced, and broad enough to provide benefits to employees who had not been replaced after going on strike. An organizational strike had been called against the Kona hotel. During the first two days, the hotel operated with the help of supervisors and guests. Service was somewhat curtailed but the hotel remained open. Later in the week, the employer hired some replacements and full operations resumed. The union was informed that 11 positions were still vacant; 32 employees had begun the strike. The positions were not accepted.

As to those employees who had been replaced, the British Umpires' interpretation of work stoppage would allow payments of benefits. The Hawaii court went further, however, and found all the claimants to be eligible under the American work stoppage test. The same general pattern reoccurred in *Gaspro* v. *Labor & Ind. Rel. Comm'n*, 46 Haw. 164, 377 P. 2d 932 (1962), viz., an organizational strike, Gaspro shut down temporarily, then permanent rehire and business continued. The strikers lost their jobs.

The holdings of both *Akahane* and *Gaspro* would have been justified under the British construction of "work stoppage."

It was with *Meadow Gold Dairies* v. *Wiig*, 50 Haw. 225, 437 P. 2d 317 (1968), that Hawaii, like many other state courts having similar "stoppage of work" clauses in their unemployment acts, went far beyond the British rule and gave benefits to strikers—without regard to job loss—when the employer was able to keep up substantial (about 80% in Hawaii) operations.

The Legal Issue

Meadow Gold and the subsequent state awards anent the Hawaiian Electric strike thus have with certainty in Hawaii created the problem now before this court: Has Hawaii's interpretation and application of the "stoppage of work" clause in its Unemployment Compensation Act so impermissibly altered and affected the relative economic strength of union versus employer in their bargaining relationship, as to thereby encroach upon and into the field pre-empted by the NLRA in violation of the Supremacy Clause of the Constitution?

Congressional Intent and the Issue

As heretofore found, even in the broader problem of payment of benefits to strikers, where the issue of "work stoppage" is not involved, a clear determination of "Congressional intent" cannot

[289]

be made. Moreover, on the question of work stoppage and payment to strikers, not even a whisper of "Congressional intent" has been heard. The *best* that can be said is that its intent is ambiguous in this labor law area. Although any clarity of Congressional intention be lacking, the court must nevertheless decide whether Hawaii's law impermissibly interferes in a federally preempted field. Under the preemption doctrine, state legis-

lation may be invalid even if it does not directly interfere with federal legislation.[70] When the legislative schemes underlying the Social Security Act and the N. L. R. A. are compared, it is apparent that in the labor area, except in the narrow area in which the states' traditionally intense interest in public order survives, Congress intended to preempt the labor field.[71]

Employers' "Rights"

Plaintiffs have maintained and defendants have denied that an employer has a right under the N. L. R. A. to keep his business operating during a strike. True, there is no specific statement in the N. L. R. A. that an employer has such a right. That right exists, nevertheless. As the Ninth Circuit said in *Hawaii Meat Co.* v. *NLRB*, 321 F. 2d 397, 400 (1963): "No case holds that a struck employer may not try to keep his business operating; on the contrary, it is quite clear that he has the right to do so." In accord are *NLRB* v. *Mackay Co.*, 304 U. S. 333, 345, 58 S. Ct. 904, 82 L. Ed. 1381 (1938), as well as *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 232, 831 S. Ct. 1139, 10 L. Ed. 2d 308 (1963).

SYNTHESIS OF FACTS

(as found here and in this court's prior decision)

A. *Employees*

1. No striker's job was ever in jeopardy.

70. *See Conceptual Refinement of the Doctrine of Federal Preemption*, 22 J. Pub. L. 391 (1973); Note, *Federal Preemption*, 1966 Duke L. J. 484.

71. Cox, *supra* note 49, at 1358. Hawaii's interest in paying unemployment benefits to strikers is in no way analogous to state interest in preventing violence on the picket line, *see San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959), and therefore not within the public order exemption.

2. Before the strike, at least some employees were concerned about receiving unemployment benefits.
3. During the strike, almost all 3000 strikers applied for and expected to get benefits.
4. The benefits would provide for a large percent of a striker's regular pay, *i.e.*, needs.
5. Strikers, after filing of the instant suit, condemned the action as diminishing "our ability to strike."
6. Ruttenberg acknowledged impact of benefits.

B. *Employers*

1. TELCO states possible payment of benefits and additional tax burden affected bargaining offer.
2. TELCO's negotiator stated it was a factor in the talks.
3. TELCO was ordered by the state to divulge its financial and operative facts to the state (and union) during the strike.
4. TELCO was facing a possible tax "contribution" of over $190,000 per week of strike, with no assurance of recovery, while it kept business operating.

C. *State*

1. State actively assisted union and strikers in filing claims.

[290]

2. State demanded disclosure of TELCO's earnings and other financial data during strike.
3. If an employer closes down operations during a strike, the state pays no benefits to strikers.[72]

72. A vital facet of the factual inquiry before this court is *not* whether benefits are paid to strikers. Rather, under *Grinnell*, it is whether the payment of money in fact *affects* the collective bargaining process or is *extraneous* to that process.

CONCLUSIONS

It was unquestionably the intent of Congress that collective bargaining, free from state interference, should be the foundation of the federal labor policy. *Local 24, Teamsters* v. *Oliver,* 358 U. S. 283, 79 S. Ct. 297, 3 L. Ed. 2d 312 (1959); *Local 20, Teamsters* v. *Morton,* 377 U. S. 252, 84 S. Ct. 1253, 12 L. Ed. 2d 280 (1964). Employer and employees alike have a right to the benefit of every privately furnished economic weapon available in implementing their respective bargaining positions, in carrying on or opposing a strike. Contributions by fellow unions and employers are permitted.[73] Unless the state activity is but a peripheral concern of the Act or there is an overriding state interest, a state may not assist either party in a labor dispute, *i.e.,* interfere with collective bargaining,[74] a state must be neutral.

> For a State to impinge on the area of labor combat designed to be free is quite as much an obstruction of Federal policy as if the State were to declare picketing free for purposes of or by methods which the federal Act prohibits. *Garner* v. *Teamsters,* 346 U. S. 485, 500, 74 S. Ct. 161, 98 L. Ed. 228 (1953).

Under Hawaii's law, when the avowed objective of closing down the employers plant[75] is achieved by the union, no benefits

73. *Kennedy* v. *Long Island Rail Road Co.,* 319 F. 2d 366 (2nd Cir. 1963); *Air Line Pilots Assn. International* v. *C. A. B.,* 163 U. S. App. D. C. 451, 502 F. 2d 453 (1974).

74. *Linn* v. *Plant Guard Workers,* 383 U. S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966); *Plumbers' Union* v. *Borden,* 373 U. S. 690 (1963); *Automobile Workers* v. *Russell,* 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030 (1958); *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance,* 349 Mass. 390, 398, 208 N. E. 2d 516, 522 (1965).

75. Henry B. Epstein, state director of the U. P. W., Tr. Dec. 10-17, at 207, 229.

may be paid the strikers. The state is then neutral. When, however, the employer is successful in resisting the union attack, and keeps his business in substantially full operation, the state, after the first week of the strike, takes sides against the employer, and for the strikers. As indicated, it sets about giving great financial assistance to the strikers, and extracting valuable (to the strikers) financial and other information, as well as burdening the employer with future increased tax burdens. The strikers' position when a strike is called, with the state's assist, becomes one of "heads I win, tails you lose"!

On its face, therefore, Hawaii's statute irreconcilably intrudes into the federal process of free collective bargaining.

It cannot with any validity be argued that Hawaii's law implements any necessary "state purpose". The striker picketing a closed-down shop is just as in need of benefits as is the striker picketing a shop in full operation. Nevertheless Hawaii now gives aid to the latter but none to the former.

Congress has never even inferred that it approves this anomalous situation. In the absence of any Congressional approval, it can only be said that Hawaii's statute impermissibly intrudes into the area of labor law fully occupied by the N. L. R. A. The application of Hawaii's law also clearly frustrates Congress' ukase that the collective bargaining process must be free from state interference. Hawaii's statutory scheme for unemployment assistance to strikers therefore cannot stand, but must be stricken down.

[291]

TELCO's prayer for a permanent injunction is granted.

Plaintiffs will prepare the order. TELCO's bond is cancelled.

AMENDED DECLARATORY JUDGMENT AND ORDER FOR PERMANENT INJUNCTION

It is hereby ordered and declared that defendants' payment or consideration for payment of claims for unemployment compensation benefits for periods of unemployment incurred by claimants' participation in a strike against an employer engaged in interstate commerce, as Hawaii Revised Statutes, Section 383-30(4), has been and is now applied, constitutes an unlawful and impermissible infringement upon the scheme of collective bargaining established and preempted by Congress, in violation of the supremacy clause of the Constitution of the United States;

It is further ordered and declared that H. R. S. § 383-30(4), insofar as it presently is administered to disqualify other claimants unemployed due to a labor dispute, is valid;

It is further ordered and declared that the State of Hawaii Department of Labor and Industrial Relations and its Director and employees shall permanently cease and refrain from investigating, processing, disclosing information regarding employer operations, or making payment upon claims for unemployment compensation filed by or on behalf of any individual employed by Hawaiian Telephone Company whose unemployment during the period from May 7 to June 16, 1974, was due to a labor dispute at the factory, establishment or other premises of Hawaiian Telephone Company during such period, or by or on behalf of any other individual employed by any other employer engaged in interstate commerce or in an industry affecting interstate commerce, as such employer or industry is defined by the National Labor Relations Act, if such individual's unemployment is due to a labor dispute at the factory, establishment or other premises of such employer;

It is further ordered and declared that nothing herein shall prevent or enjoin any person from filing any claim for State of Hawaii unemployment benefits;

It is further ordered and declared that with respect to labor disputes involving an employer engaged in interstate commerce or in an industry affecting interstate commerce as defined in the National Labor Relations Act and related claims for unemployment compensation benefits requiring application of H. R. S. § 383-30(4) arising after the entry of this Judgment, the Department of Labor and Industrial Relations shall refrain from investigating such claims until leave of court is obtained for good cause, upon at least 48 hours advance notice to the employer and labor organizations involved in said labor dispute;

It is further ordered and declared that the Director of the State of Hawaii Department of Labor and Industrial Relations shall, effective December 1, 1975, advise all claimants for unemployment compensation that claims will not generally be processed nor benefits paid for periods during which claimant is on strike or otherwise not working due to participation in a labor dispute with an employer engaged in interstate commerce or an industry affecting interstate commerce;

It is further ordered and declared that there being no just reason for delay, that Count II of the Complaint herein shall be and hereby is ordered dismissed without prejudice. In the event plaintiffs renew Count II, no finding of laches or statute of limitations shall bar relief otherwise found herein to be appropriate, provided timely renewal is made by plaintiffs subsequent to any dissolution or modification of these orders.

It is further ordered and declared that the Clerk shall enter this Amended Order as the final Judgment herein in lieu of any prior Judgment entered and that each party shall bear its own costs of these proceedings.

Supreme Court, U.S.
FILED
MAY 13 1980
MICHAEL RODAK, JR., CLERK

No. 79-1699

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HAWAIIAN TELEPHONE COMPANY,
and
HAWAII EMPLOYERS COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES, and CHAMBER OF COMMERCE OF HAWAII,

Petitioners,

vs.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, ROBERT K. HASEGAWA, THOMAS S. BROWN,
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1357, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1260, and HAWAII STATE FEDERATION OF LABOR, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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193

INDEX

	Page
Introduction	1
Argument	3
I. The Claimed Circuit Conflict Is Entirely Specious	3
II. This Court Has Already Twice Decided the Determinative Issue in This Case	5
Conclusion	10

TABLE OF AUTHORITIES

CASES

	Pages
Albuquerque-Phoenix Express, Inc. v. Employment Security Commission, 88 N.M. 596, 544 P.2d 1161	4
Dow Chemical Co. v. Taylor, 428 F. Supp. 86	4
Hicks v. Miranda, 422 U.S. 332	5
Kimbell v. Employment Security Comm. of New Mexico, 429 U.S. 804	passim
Mandel v. Bradley, 432 U.S. 173	4, 5
Meadow Gold Dairies v. Wiig, 55 Haw. 225, 437 P.2d 317	4
National Gypsum Co. v. Louisiana Dept. of Employment Security, 313 S. 2d 230 (La. Sup. Ct.)	6
New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519	passim
Ohio Bureau of Employment Service v. Hodory, 431 U.S. 471	6, 7
Super Tire Engineering Corp. v. McCorkle, 550 F.2d 903, cert. denied 434 U.S. 827, rhg. denied 434 U.S. 1025	3, 4

CONSTITUTIONAL PROVISIONS AND STATUTES

Hawaii Revised Statutes	
§ 383-29(2)	9
§ 383-29(3)	9
§ 383-30(4)	4
§ 386-65	9
§ 386-68	9
New Mexico Unemployment Compensation Law, § 59-9-5(d), N.M. Stat. Ann (1974)	4

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Joint Brief for Respondents in Opposition

INTRODUCTION

There is one significant omission from Petitioners' Statement of the Case: It fails to note that this is the *second* petition for a writ of certiorari Petitioners have filed in this case. The first Petition (No. 77-962) was filed prior to the decision in the Ninth Circuit, on the same day the petition for writ of certiorari was filed in *New York Telephone Co. v. New York Department of Labor*. 440 U.S. 519. That

petition stressed the identity of issues between this case and *New York Telephone:*

> The sole question presented for resolution by the AFL-CIO to the Ninth Circuit is a variant of the pivotal question in *New York Telephone, supra, i.e.,* "Did Congress determine to permit states to pay unemployment insurance benefits to strikers if they so choose?" Since [*New York Telephone*] involves essentially the same issue and merits resolution by this Court, Petitioners should be afforded full participation when that conflict is resolved.
>
> (Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 77-962, p. 13).[1]

This Court, in *New York Telephone,* granted certiorari and determined that Congress did intend to permit New York to pay unemployment benefits to strikers if it so chose, even if there was an impact upon the balance of economic power in labor disputes. Petitioners consequently now deny what they had earlier stressed—that the determinative issue in *New York Telephone* and this case is the same. Instead, they seek vigorously to discover distinctions between Hawaii's statute and that upheld in *New York Telephone* which would somehow justify a different result in this case. (Petition, p. 9).

Similarly, Petitioner Chamber of Commerce earlier was quite aware that *Kimbell v. Employment Security Comm.*

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1. *See also* Brief *Amici Curiae* on behalf of (*inter alia*) Hawaiian Telephone Co., the Chamber of Commerce of Hawaii and Hawaii Employer's Council in *New York Telephone,* No. 77-961, p. 5:

> Although each state system differs, the ultimate impact of the payments made during the . . . Hawaiian Telephone . . . [strike] closely resembles the impact found in the case at bar. Thus, the question before the Court—whether the availability of state unemployment benefits to striking employees intrudes into an area left by Congress to the "free play of economic forces . . ."—is a question of great significance to Amici.

of New Mexico, 429 U.S. 804, involved a law "in all material respects, virtually identical" to Hawaii's statute and presented "the same generic issue" as this case. See Brief for the Chamber of Commerce as *Amicus Curiae,* No. 75-1452, p. 2. Now, however, Petitioners insist that "the instant case [is] wholly inapposite to *Kimbell.*" (Petition, p. 7).

In fact, Petitioners' original perceptions were correct: The determinative issue in this case *is* the same as that in *New York Telephone,* and *Kimbell is* identical to this case in all material respects. Thus, there are not one but two recent decisions of this Court squarely controlling, and there is no reason whatever for this Court to address the issue of the legality of unemployment insurance for strikers once again.

ARGUMENT

I. The Claimed Circuit Conflict Is Entirely Specious.

Petitioners contend that federal courts of appeal have differed upon the import of the summary affirmance in *Kimbell, Inc. v. Employment Security Comm.,* 429 U.S. 804, citing *New York Telephone Co. v. New York Dept. of Labor,* 566 F.2d 388 and *Super Tire Engineering Corp. v. McCorkle,* 550 F.2d 903, cert. denied 434 U.S. 827, rhg. denied 434 U.S. 1025. The short but complete answer to this contention is that the *result* in all three cases was the same —*viz.,* a rejection of the plaintiffs' attack on public assistance to strikers: in this case and in *Super Tire* on the authority of *Kimbell;* in *New York Telephone* on the basis of comprehensive *de novo* analysis of the legislative material. Thus, in terms of the substantive rule announced, the three decisions are entirely consistent.

Moreover, contrary to Petitioners' claim, the reasoning of *New York Telephone* and of the decision below is also

consistent.[2] The Second Circuit in *New York Telephone* faced the problem of determining the application of *Kimbell* to a case involving a statute different from the New Mexico statute in *Kimbell*.[3] Thus, the question before the Second Circuit was not whether *Kimbell* is binding at all, but whether it could have been decided upon grounds not applicable to the somewhat different New York statute. *Mandel v. Bradley,* 432 U.S. 173, 177.

Kimbell and this case, however, concern statutes precisely the same both in wording[4] and in construction.[5] Thus, even if the result in *Kimbell* was directly dependent on the specific provisions of the New Mexico statute[6] it "necessarily decided" (*Mandel v. Bradley, supra,* 432 U.S. at 176) the validity of Hawaii's identical statute. This case and *New York Telephone* are each therefore entirely consistent with

2. *New York Telephone* and *Super Tire* may indeed be in tension on their reasoning, although not in their result, since both involved statutes different from the statute in *Kimbell.* This Court, however, declined an invitation to review *Super Tire* because of this disagreement. *See* Petition for Rehearing, No. 76-1684, pp. 2-4. A difference between two other courts of appeal on a question not involved here obviously cannot constitute a justification for review in this case.

3. The New York statute provided benefits after eight weeks regardless of whether the strike succeeded in closing the employer's business. *New York Telephone, supra,* 440 U.S. at 523.

4. Both the New Mexico and the Hawaii statute disqualify applicants for unemployment "[f]or any week with respect to which . . . his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed. . . ." New Mexico Unemployment Compensation Law, § 59-9-5(d), N.M. Stat. Ann. (1974); Hawaii Revised Statutes § 383-30(4).

5. *See Albuquerque-Phoenix Express, Inc. v. Employment Security Comm'n,* 88 N.M. 596, 544 P.2d 1161, 1165-1166; *Meadow Gold Dairies v. Wiig,* 55 Haw. 225, 437 P.2d 317.

6. *See New York Telephone,* 566 F.2d at 391, n.2, relying upon *Dow Chemical Co. v. Taylor,* 428 F. Supp. 86. *Dow Chemical,* 428 F. Supp. at 91, discussed at length the reasons why *Kimbell,* as a summary affirmance, might be limited to the New Mexico/Hawaii variant of benefits for strikers.

both *Hicks v. Miranda,* 422 U.S. 332 and *Mandel* in their approach to the summary affirmance in *Kimbell,* and there is no conflict between them.

II. This Court Has Already Twice Decided the Determinative Issue in This Case.

1. Petitioners would put *Kimbell* aside on the ground that the decision resulted from inadequate evidence that New Mexico's unemployment system had an actual impact upon collective bargaining. (Petition, pp. 8-9). But, the Court in *Kimbell* necessarily decided that *whatever* the effect of New Mexico's payment of unemployment compensation upon collective bargaining, Congress did not intend to preempt the state law.[7]

When invited by the Court in *Kimbell* to express its views, the United States declared:

> "In our view [a] remand [to factually determine impact upon collective bargaining is] unnecessary because the legislative history is not ambiguous as to Congress' lack of pre-emptive intent . . . [Since] [i]n *Hawaiian Telephone Company* . . ., the district court . . . also found the legislative intent to be unclear . . . [f]or the reasons stated above, we believe that decision to be erroneous."
>
> Memorandum for the United States, No. 75-1452, p. 5.

The United States therefore urged that "the appeal should be dismissed for want of a substantial federal question." *Id.,* p. 11.

7. While New Mexico did defend the *Kimbell* decision in part on the ground that " 'the labor dispute had been settled before . . . [it was] decided that the striking complainants were entitled to any unemployment benefits' " (see Petition, p. 8), that fact cannot possibly serve to distinguish this case. For here, the inquiry into the availability of benefits did not even begin until after the strike had ended (Pet. App. A2, A14) and it has not to this day been determined whether any claimants will collect benefits due to the 1974 Hawaiian Telephone strike. (Pet. App. A3, A54-55).

In response, one of the present petitioners, the Chamber of Commerce of the United States, specifically noted in its brief the evidentiary record in the present case, and concluded that if *Kimbell* were not summarily reversed, this Court "should not foreclose subsequent determinations in the pending cases where the issue is more completely and less abstractly presented." Brief for the Chamber of Commerce as *Amicus Curiae,* No. 75-1452, p. 25. The way to preserve the generic labor preemption question for consideration by those courts was, the Chamber insisted, for this Court to qualify its dismissal in *Kimbell,* as it had done in *National Gypsum Co. v. Louisiana Dept. of Employment Security,* 313 S. 2d 230 (La. Sup. Ct.), *appeal dismissed for want of a properly presented federal question,* 423 U.S. 1009, with the words "for want of a properly presented federal question" or by noting that "the constitutional issue comes to the Court in highly abstract form." Brief for the Chamber of Commerce, *supra,* pp. 25-26.

This Court chose not to indicate in any of these ways that there was a substantial federal question that had been inadequately litigated. Instead, it treated with the question presented[8] on the merits, by dismissing "for want of a substantial federal question."

2. Petitioners seek also to avoid *Kimbell* on the ground that "the doctrinal developments articulated by this Court in *Ohio Bureau of Employment Service v. Hodory* [431 U.S. 471, 475 n.3] and in [*New York Telephone, supra*]" (Petition, p. 9) have obliterated *Kimbell* as binding upon

8. The question presented in *Kimbell* was:
Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by disrupting the operation of federal labor policy requiring state neutrality in the collective bargaining process?
(Jurisdictional Statement, No. 75-1452, p. 4).

the lower courts. But, the express statement in *Hodory* that the Court was not deciding any pre-emption question[9] is surely not a "doctrinal development." And the "doctrinal development" in *New York Telephone* reinforced rather than undermined *Kimbell:* it made clear that Congressional approval of payment of unemployment benefits to strikers was not limited to the New Mexico/Hawaii variant, which renders benefits uncertain because based on an occurrence beyond the strikers' control, but extended as well to the New York statute, which *guarantees* benefits after eight weeks on strike.

The three separate opinions for the six-Justice majority in *New York Telephone* differ on certain theoretical questions concerning labor law preemption as applied to state benefit programs generally. In identifying the key question in *New York Telephone,* however, and in resolving that question, there was complete unanimity among the six Justices who voted to uphold New York's law. All six agreed that the central issue was "whether the National Labor Relations Act . . . implicitly prohibits . . . paying unemployment compensation to strikers." (440 U.S. at 522 (plurality opinion)). None viewed the issue as limited to whether the *particular* way in which New York has determined to pay strikers—by postponing benefits for eight weeks—was approved by Congress. And, the conclusion reached by the majority was similarly general: Congress not only failed to forbid payment to strikers but on "the question of paying benefits to strikers . . . chose . . . to leave *this aspect* of

9. In *Hodory,* the Court said: "At no point in this litigation has appellee claimed that § 4141.29(D)(1)(a) conflicts with or is preempted by any provision of the National Labor Relations Act, 29 U.S.C. § 151 et seq. We do not today consider or decide the relationship between that Act and a statute such as § 4141.29 (D)(1)(a)." (431 U.S. 471, 475 n.3).

unemployment eligibility to the States."[10] (440 U.S. at 545 (plurality opinion, emphasis added).) The plurality added:

> Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments. (440 U.S. at 544.)[11]

Justices Blackmun and Marshall subscribed completely to "that portion of Part III of the Court's opinion, where the conclusion is reached that Congress has made its decision to *permit a State to pay unemployment benefits to strikers.*" (*Id.* at 547, emphasis added.) And, Justice Brennan concurred in Justice Blackmun's conclusion in that regard. (*Id.* at 546-547).[12]

Thus, *New York Telephone* did not hold, as Petitioners would have it, that Congress permitted states only the exceedingly narrow choice between the precise terms of the New York statute and a flat prohibition upon unemploy-

10. *See also id.* at 540: "Congress [did not intend] to deny the States the power to provide unemployment benefits for strikers. . . . [Rather] Congress intended the States to *make this policy determination for themselves.*" (Emphasis supplied). Further, the entire legislative history discussion in *New York Telephone* concerns not the specific time duration variant enacted in New York but generally, "the subject of benefits for strikers" (*id.* at 541), or "the issue of public benefits for strikers" (*id.* at 542).

11. The three dissenting Justices as well were quite clear about the scope of the majority's holding: "[T]he Court indicates that the Social Security Act gives the States *complete control over this aspect* of their unemployment compensation programs." (440 U.S. at 565, emphasis added).

12. As the broad language quoted in the text indicates, the "some other preemption case" (440 U.S. at 549) which concerned Justices Blackmun, Marshall and Brennan was not simply another variant upon paying unemployment benefits to strikers. Rather, the three concurring Justices were seemingly concerned with labor law preemption of benefit programs other than unemployment compensation, and, as well, of unemployment benefit provisions not involving payment of benefits to strikers.

ment benefits to strikers. Rather, the Court in *New York Telephone,* quite aware that payment of benefits to strikers ". . . has altered the balance of economic power between labor and management," (440 U.S. at 531 (plurality opinion); *see also id.* at 547 (Blackmun, J., concurring)), held that the Congressional intent was to leave to the states the entire issue of whether and on what conditions strikers should receive benefits.[13] The purported differences between Hawaii's statute and New York's (Petition at 9) therefore would be irrelevant even if accurate.[14]

Nor can *New York Telephone* be distinguished as a law "which confers benefits on a broadly defined class of unemployed persons." (Petition, p. 9). The relevance of the distinction between a law of general application and one specifically concerning labor-management relations was rejected

13. The Court was quite cognizant when it decided *New York Telephone* that many states pay strikers under circumstances differing from those in New York. Indeed, both the district court opinion in this case and the summary affirmance in *Kimbell* were cited as illustrative of the predominant variant. (440 U.S. at 534 n. 24 (plurality opinion); *id.* at 556 n. 7 (Powell, J., dissenting)). Yet, there was no suggestion that the more predominant "American rule" (see 440 U.S. at 534 n. 24) might be preempted although the peculiar New York provision is not.

14. In fact, however, all four of the represented differences are incorrect. (a) There was no evidence in this case that Hawaii had ever conducted an investigation of a labor dispute during a strike. (b) Hawaii does *not* waive the "availability" requirement of § 383-29(3), Haw. Rev. Stat., for strikers, nor is there any exception to the requirement that a suitable job offer must be accepted. Hawaii, unlike other states, does not expressly require for *any* claimant an active search for work as a precondition for unemployment benefits. And, while Hawaii does not, to be sure, require strikers to register for work with the employment service, that is because registration for work is waived for all benefit claimants still attached to an employer. (Haw. Rev. Stat. § 383-29(2); Tr. Dec. 13, 1974, pp. 700-701). Thus, strikers in Hawaii are treated similarly to others temporarily out of work. (c) In New York, any striker may collect benefits after eight weeks, whether or not his former job has been filled. (d) Hawaii, like New York (*New York Telephone,* 440 U.S. at 524 n.4), does not necessarily recoup from an employer all benefits paid to his employees. *See* Haw. Rev. Stats. §§ 386-65, 383-68.

by five members of the Court in *New York Telephone.* 440 U.S. at 550 (Blackmun, J., concurring); *id.* at 558 (Powell, J., dissenting)) and questioned by a sixth (*id.* at 546 n. *, Brennan, J., concurring). And, the New York statute, like the Hawaii statute, covers in a special provision the payment of benefits to strikers.[15]

CONCLUSION

Petitioners are seeking nothing less than to relitigate an issue twice decided—in summary fashion in *Kimbell,* and, after extensive briefing and argument, with full opinions in *New York Telephone.* The petition for writ of certiorari should be denied.

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15. In fact, Petitioners Hawaiian Telephone Co.. Chamber of Commerce of Hawaii, and Hawaiian Employers' Council, in their brief *amici curiae* in *New York Telephone* (at 10-11) specifically attacked the New York statute as "an impermissible special accommodation [because] [t]he receipt of benefits results solely from an employee's status as a striker." (*See also id.* at 21, 31).